

# TRANSCRIPT OF RECORD

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## Supreme Court of the United States

OCTOBER TERM, 1957

No. 303

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ALASKA INDUSTRIAL BOARD AND  
CARL E. JENKINS,

*Petitioners,*

*vs.*

CHUGACH ELECTRIC ASSOCIATION, INC., A COR-  
PORATION, AND GENERAL ACCIDENT, FIRE  
AND LIFE ASSURANCE CORPORATION, LTD.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED JULY 22, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

No. 14616

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**United States  
Court of Appeals**  
for the Ninth Circuit

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**ALASKA INDUSTRIAL BOARD**, Composed of  
**HENRY A. BENSON**, Territorial Commissioner of Labor; **NEIL F. MOORE**, Territorial Insurance Commissioner; and **J. GERALD WILLIAMS**, Attorney General of Alaska; and **CARL E. JENKINS**,

Appellants,

vs.

**CHUGACH ELECTRIC ASSOCIATION, INC.**, a Corporation, and **GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD.**, a Corporation,

Appellees.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
First Division**



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**NAMES AND ADDRESSES OF ATTORNEYS**

**J. GERALD WILLIAMS,**

**P. O. Box 366,**

**Juneau, Alaska,**

**For the Appellants.**

**R. E. ROBERTSON, ESQ.,**

**200 Seward Bldg.,**

**Juneau, Alaska,**

**For the Appellees.**

Form AIB No. 104AB

First Report

Physician's Report of Injury  
to the Territory of Alaska  
Alaska Industrial Board  
Box 2141, Juneau

This report to be filed forthwith after first attendance.

The Patient

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age: 42.  
Married or Single: M. Sex: M.
2. Address: 611 East 4th. City or Town: Anchorage.
3. Name of Employer: Chugach Electric Assn.  
Business: Elec. Distribution.
4. Address of Employer: 4th & East E. City or Town: Anchorage.
5. Insured by (Name of Company): General Accident, Bud Nock, Box 1313, Anchorage.

The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m.  
Date disability began: 9-21-50.
1. State in patient's own words where and how accident occurred: Working on 12,000 volt stuff—came to on the ground.

**The Injury**

8. Give accurate description of nature and extent of injury and state your objective findings:  
1. 3rd degree burns of left arm at the elbow down to the bone, no pulse, no sensation of the lower arm. (Continued on attached sheet.)
9. Will the injury result in (a) Permanent defect? Yes. If so, what? See attached sheet. (b) Facial or head disfigurement? No.
10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes .....
11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? Yes. Give particulars: Temporary cardiac irregularity after accident. Did accident aggravate this condition?.....
12. Has patient any physical impairment due to previous accident or disease, No. Give particulars: .....
13. Has normal recovery been delayed for any reason? No. Give particulars:.....

**Treatment**

14. Date of your first treatment: 9-21-50. Who engaged your services? Employer.
15. Describe treatment given by you: See attached sheet.

16. Were X-rays taken? No.
17. X-ray diagnosis.....
18. Was patient treated by any one else? No.
19. Was patient hospitalized? Yes. Name and address of hospital: Providence, Anchorage, Aaa
20. Date of admission to hospital: 9-21-50. Date of discharge: .....
21. Is further treatment needed? Yes. For how long? Indefinite.

**Disability**

22. Patient was/will be able to resume regular work on: Indefinite.
23. Patient was/will be able to resume light work on: Indefinite.
24. If death ensued, give date: .....

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of California—Alaska.

Physician's Name: H. G. Romig, M.D.

/s/ H. G. ROMIG,

Address Box 373, Anchorage,  
Alaska.

Date of this report 9-22-50.

[Stamped]: Received Oct. 4, 1950.



**[Attached to Report]**

8. (2) Deep 2nd. & 3rd. degree burns of left upper arm, elbow to axilla. (3) 2nd. degree burn of right forearm. (4) 3rd. degree burns of both feet with varying degree up ankles.
9. Loss of toes, and feet in part. Loss of left lower arm.
15. Sterile debridement and dressing. Antibiotics topically and systemically. Plasma, glucose, morphine.

Received October 4, 1950.

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Form AIB No. 104AB

Physician's Report of Injury  
to the Territory of Alaska  
Alaska Industrial Board  
Box 2141, Juneau

This report to be filed forthwith after first attendance.

This form may also be used for submitting supplemental information.

**The Patient**

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electric Lineman.  
Age: 44. Married or Single: M. Sex: M.

2. Address: 611 E. 4th Ave. City or Town: Anchorage.
3. Name of Employer: Chugach Electric Ass'n.  
Ins. Business: .....
4. Address of Employer: ..... City or Town: Anchorage.
5. Insured by (Name of Company): .....

### The Accident

6. Date of Accident: 9-22. Hour: 1:15 p.m. Date disability began: 9-22, 1:15 p.m.
7. State in patient's own words where and how accident occurred: Patient caught in a 12,000 volt arc which entered his body thru left elbow and exploded thru both feet.

### The Injury

8. Give accurate description of nature and extent of injury and state your objective findings. Extensive elec. burns left arm and hand and both feet.
9. Will the injury result in (a) Permanent defect? Yes. If so, what? Amputations—3 extremities. (b) Facial or head disfigurement? .....
10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes. ....
11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular

system or any other disabling condition not due to this accident?..... Give particulars.....  
Did accident aggravate this condition?.....

12. Has patient any physical impairment due to previous accident or disease..... Give particulars .....
13. Has normal recovery been delayed for any reason?..... Give particulars.....

### Treatment

14. Date of your first treatment: 9-29-50. Who engaged your services? Patient.
15. Describe treatment given by you: amp. left arm above elbow; rt. leg mid-calf; left foot all toes except 5th.
16. Were X-rays taken?..... By whom?.....  
When? .....
17. X-ray diagnosis.....
18. Was patient treated by any one else? Yes. By whom? Howard Romig. When? 9.... to 9-29.
19. Was patient hospitalized? Yes. Name and address of hospital: Virginia Mason Hosp.
20. Date of admission to hospital: 9-29-50. Date of discharge: .....
21. Is further treatment needed? Yes. For how long? Indefinite.

Disability

22. Patient was/will be able to resume regular work on: .....
23. Patient was/will be able to resume light work on: .....
24. If death ensued, give date: .....

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of....

Physician's Name: Louis H. Edmunds.

/s/ LOUIS H. EDMUNDS,

Address 1115 Terry Ave.

Date of this report 10/24/50.

Received November 1, 1950.

AIB-4b

Territory of Alaska  
Alaska Industrial Board

Physician's Supplementary Report.

1. Name of injured person: Mr. Carl Jenkins.  
Address: Anchorage, Aaa.
2. Name of employer: Chugach Electric Assn. Address: Anchorage, Aaa.
3. I first attended him on: Case re-opened 3-31-51.
4. I have since attended him on the following dates, viz., April 6, 16, 20, 27, 1951; May 4, 11, 18, 24, 31, 1951; June 7, 14, 21, 28, 1951.

5. Give an accurate and complete description of the nature and extent of the injury which resulted from the accident or occupational exposure and present condition (state your objective findings):

At the present time left foot is improving, but whether it can be permanently preserved without amputation is still a moot question otherwise his progress is slow but satisfactory.

6. Is the claimant's present condition the result of the injury above described? Yes.

Sec. 1-12 (In those cases where an employee receives an injury arising out of and in the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury, provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability, out of the second injury fund hereinbefore created and provided.)

7. In your opinion, was the accident or occupational condition as above described a competent producing cause for the injury sustained? Yes.

8. Is he able to resume his usual work? No. If so, when first able?.....
9. Is he able to resume any work?..... If so, when first able and Nature of work?.....
10. Dated at Anchorage, Alaska, this day of 29th June, 1951.

J. H. STEWART, M.D.,

/s/ J. H. STEWART,

Address, Box 373 Anchorage,  
Aaa.

[Stamped]: Received July 10, 1951.

Anchorage Medical & Surgical Clinic  
Fourth Ave. and L Street, Post Office Box 373  
Anchorage, Alaska

August 17, 1951.

Mr. Henry Benson,  
Commission of Labor,  
Juneau, Alaska.

Re: Carl Jenkins.

Dear Mr. Benson:

There is no doubt but what Mr. Jenkins will be a long time disabled, and under care. Whatever is right should be done for him.

Sincerely,

/s/ H. G. ROMIG,

H. G. ROMIG, M.D.

Received August 27, 1951.

Anchorage Medical and Surgical Clinic  
4th Ave and L Street  
Box 373  
Anchorage, Alaska

Asa L. Martin, M.D.

Howard G. Romig, M.D.

September 21, 1951.

James E. Swan,  
1 Pearl Building,  
Anchorage, Alaska.

Re: Carl Jenkins.

Date of injury: 3-31-51.

Employer: Chugach Electric Association.

Dear Mr. Swan:

The Alaska Industrial Board has the complete routine file on Mr. Jenkins; also a couple of more complete letters.

To make it short the man has the left arm amputated near the shoulder. The artificial arm is purely a cosmetic device and serves no function. The same is not true for the artificial limb replacing the leg amputated below the knee. He has average function of the artificial leg.

The right leg is largely useless due to a slowly healing foot wound. Furthermore the foot and ankle on this side are almost without sensation even though healed over by scar.

The man is totally disabled. The foot will heal in a matter of months—how many I cannot say.



When healed he will be disabled to a very very high degree.

Sincerely,

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M. D.

GH:HGR

cc: Mr. Jenkins.

cc: Alaska Industrial Board.

[Stamped]: Received October 3, 1951.

Anchorage Medical & Surgical Clinic

4th Ave. and L St., Box 373

Anchorage, Alaska

May 2, 1952.

Alaska Industrial Board,

Box 2141,

Juneau, Alaska.

Re: Carl Jenkins.

Date of injury: 9-21-50.

Employer: Chugach Electric Assoc.

Dear Sir:

This man was injured 9-21-50, while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

The right leg and left arm with artificial limbs work as well as could be expected. The left foot however has failed to heal. Any use of the foot causes breakdowns and slough of the tissues.

On the whole the circulation of the left foot is better. Yet weight bearing causes necrosis\* and slough.

My plans for treatment would encompass any or possibly all the following procedures: (1) re-hospitalization (2) sympathectomy (3) re-amputation and (or) large thick graft.

I estimate that these procedures would be time consuming and very expensive; and yet they will be necessary to restore him to some percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an outpatient. I believe the above outlined procedures should be instituted soon.

\*Definition: Necrosis, dead tissue.

Sincerely,

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M.D.

HGR:gh

cc: Mr. Swan.

cc: Mr. Jenkins.

[Stamped]: Received May 13, 1952.

James E. O'Malley, M. D.

Virginia L. Wright, M. D.

805 Fourth Avenue

Anchorage, Alaska

July 18, 1952.

To Whom This May Concern:

Re: Jenkins, Carl E.

The above-named individual was electrocuted on September 21, 1950, during the course of his employment with Chugach Electric Association. As a result of a high voltage current passing through his body, he sustained severe burns of the right leg, left arm and left foot. The burns were so extensive and damage to the circulation was such that gangrene developed in the left arm which necessitated the removal of the left arm approximately 6" below the shoulder joint and the right leg below the knee. The left foot and ankle were extensively burned and the circulation was also impaired. The great toe and three of the lesser toes were surgically removed because gangrene intervened. The individual only has the little toe left on this foot. The individual received a prolonged period of hospitalization during which skin grafts were applied to the instep and ankle. Shortly after he became ambulatory on an artificial limb, as well as a brace on the left foot, he developed a large trophic ulcer on the end of the affected foot immediately behind the site of the amputation of the toes. This ulcerated area has resisted all efforts to heal it. X-ray examination of his foot and ankle reveals extensive osteoprosis

of the bones of the foot and ankle. In addition, there is also a small fragment of the phalanx of the fourth toe on the left foot remaining.

We have here an individual who was electrocuted and so severely burned that it was necessary to remove his right leg, his left arm and the great toe and three others on his left foot. In addition, he also lost a considerable portion of the skin of the ankle and instep as a result of extensive burns. It was necessary for him to be hospitalized over a long period of time and numerous skin grafts were applied to the injured foot. As soon as the individual became ambulatory, he developed a trophic ulcer at the end of the affected foot. This ulcer has not healed despite continuous application of treatment. It is my feeling that this individual, for all intents and purposes, has lost the use of his left foot and ankle as a result of the burns he received at the time he was injured. I further feel that this individual is facing another amputation of the left foot as I do not think the ulcer will respond to treatment and further that he is likely to develop osteomyelitis and a cellulitis, secondary to this ulcer, with the passage of time.

Very truly yours,

/s/ JAMES E. O'MALLEY,

JAMES E. O'MALLEY, M.D.

JEOM/mh

Received August 13, 1952.

Territory of Alaska  
Alaska Industrial Board

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
and GENERAL ACCIDENT FIRE & LIFE  
ASSURANCE CORPORATION, LTD.,

Defendants.

AFFIDAVIT OF LOUIS H. EDMUNDS

State of Washington,  
County of King—ss.

Louis H. Edmunds, being first duly sworn on oath  
deposes and says:

That I am a duly licensed physician and surgeon  
and for 20 years last past have specialized in or-  
thopedics. Carl E. Jenkins came under my care on  
September 29, 1950. He was injured September 21,  
1950. From the instant of his accidental injury there  
was a complete loss of use of his lower right leg  
and his left arm. The only possible repair was surgi-  
cal amputation of these extremities which was done  
by me as soon as possible.

/s/ LOUIS H. EDMUNDS.

Subscribed and Sworn to before me this 24th  
day of January, 1952.

[Seal] /s/ MILDRED M. PALITZKE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Received January 22, 1953.

Doctor's Clinic  
Box 1700  
Anchorage, Alaska

January 8, 1953.

Plummer & Areell,  
Attorneys,  
Anchorage, Alaska.

Re: Carl Jenkins.

Gentlemen:

Carl Jenkins is a 46 year old ex-lineman for Chugach Electric Company, who on Sept. 21, 1950, was handling a live wire with his right gloved hand when the current arced through the glove throwing his left arm around a 12,000 volt line. The current then went out through both feet. He was stunned until getting to hospital after which time he was receiving narcotics. September 30th the left arm was amputated 4" below the shoulder and 10-14 days later all toes except the 5th on the left were amputated, and in another 10-14 days the right leg was removed at the mid-thigh level.

His left foot has never healed solidly where the toes were removed and breaks down into an open sore frequently. Arm and leg amputation stumps healed nicely. His nerves have bothered him recently. He shakes all over at times. He has phantom sensations in arm and leg at times.

Past history—no previous accidents, operations, nor illnesses.



Family history—negative.

Systemic review—

EENT normal. Heart normal. Lungs normal.

GI—normal except that he vomits breakfast occasionally ever since having jaundice from blood transfusion.

GU—normal.

Orthopedic—normal except for present illness.

Occupational history: Patient works selling electrical tools from his own home netting usually from \$20 to \$100 monthly.

Complete examination: Patient is a well-developed and well-nourished man of approximately stated age, who has frequent spells of involuntary marked tremor involving entire body. He wears prosthesis of his left arm and his right leg. Leg brace also worn on left leg with an ankle lock to prevent foot drop.

Eyes, ears, nose and throat normal to examination today except for nasal septum deviated to right. Neck normal. Heart and lungs normal. B. P. 130/86. Examination of abdomen is negative. Genitalia—normal male. No hernia. Left arm has been amputated 7" below the shoulder, the scar is well-healed, altho there is a slight bow-string contracture along the axillary line which does not limit motion of the stump to a significant degree. Right leg has been amputated 6" below the knee. Stump is well-healed, tissue soft and skin not adherent to bone ends.



Motion of hip joints is normal as is motion in the knees.

There are numerous scars around the left ankle—two scars along the Achilles tendon, both of which are adherent to underlying tendon, a 3" scar on the lateral surface of the ankle, and a 5 x 2½" well-taken skin graft on the dorsum of ankle and foot. There is also a "L" shaped scar on the medial surface of the ankle—the horizontal arm measuring 1½", the vertical arm 2". The entire foot is badly scarred. All the toes, except the 5th have been amputated. The skin of the dorsum of the foot is adherent to the underlying bone and tendons and can be moved very little. There is an area of questionable viability measuring approximately 1" in diameter over the distal end of the 3rd metatarsal bone of the dorsum of the foot and also a small superficial ulceration measuring approximately .8 cm in diameter along the medial and dorsal aspect of the foot. There is a deep ulcer on the plantar surface of the foot right at the distal end measuring approximately 2½" x 1½", the base of which is formed of soft tissue. No bone can be palpated. Dorsiflexion of the foot is not possible. Plantar flexion is possible but is weak.

Diagnosis: Severe electrical burn with resulting amputation of left arm below the shoulder and right leg below the knee and with multiple severe injuries to the left foot and ankle.

Estimated disability: In my opinion, this man has a permanent total disability.

Yours very sincerely,

/s/ G. HALE,

GEORGE HALE, M.D.

gh:bd

[Stamped]: Received January 22, 1953.

---

5/14/53

Anchorage, Alaska.

Mr. Henry Benson,  
Juneau, Alaska.

Dear Mr. Benson:

In February of this year, I believe it was on the 2nd. the Territorial Labor Board ruled on my case: Carl E. Jenkins vs. Chugach Electric Association and General Accident Fire and Life Assurance Corp. I was represented by Atty. John D. Shaw of Anchorage. However I was not notified of the decision until March 2nd. when Mr. Shaw called me and informed me that the board had ruled against me and that he had requested Atty. James Swan to appeal my case as he could no longer represent me due to his personal legal difficulties.

I have never been able to obtain a copy of the ruling and would appreciate it if you could mail me a copy.

As my physical status has not changed since the first hearing when you ruled in my favor, I am still minus my left arm, my right leg and my left foot

has failed to heal and I am still under the care of Dr. Howard Romig, and am not able to earn a living. I am curious as to why the decision went against me.

Also would appreciate it if you could inform me when my appeal filed by Atty. Swan will be heard; it is sometimes hard to contact Mr. Swan and I would not want to be without representation when my case comes up.

Thanking you for past consideration I remain,

Very truly yours,

/s/ CARL E. JENKINS.

---

Davis, Renfrew & Hughes  
Counselors and Attorneys at Law  
Anchorage  
Territory of Alaska  
P. O. Box 477

November 10, 1953.

Territory of Alaska,  
Alaska Industrial Board,  
Workmen's Compensation,  
P. O. Box 2141,  
Juneau, Alaska.

Attention: Mr. Henry Benson.

Gentlemen:

I am writing at the request of Mr. Carl E. Jenkins, Box 1073, Anchorage, Alaska, pursuant to the

discussion Mr. Jenkins had with you on the telephone on Monday morning, November 9th, this is to request a re-opening of this matter on behalf of Mr. Jenkins.

Mr. Jenkins advises that his doctor has now taken an X-ray of his left foot and finds that a portion of the bone has deteriorated and is going to require further operations and other medical expenses.

It must be obvious here that the monies paid and offered for temporary total disability and for permanent total disability are completely inadequate to take care of Mr. Jenkins in this situation, and it seems to me that the matter might very well be re-opened in order that Mr. Jenkins might be properly compensated. Among other things Mr. Jenkins says that he had been advised by Mr. Swan, his previous attorney in connection with this matter, that an appeal had been taken from the decision of the Board, but so far as we can find no such appeal was taken. Accordingly Mr. Jenkins is apparently without recourse in this matter unless the Board takes some action to help him.

Very truly yours,

DAVIS, RENFREW &  
HUGHES,

By /s/ EDWARD V. DAVIS.

EVD:s

Alaska Industrial Board

Juneau, Alaska

Docket No. 252

Case No. 0-9-370

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION and  
GENERAL ACCIDENT FIRE & LIFE AS-  
SURANCE CORP, LTD.,

Defendants.

AFFIDAVIT IN SUPPORT OF REQUEST FOR  
ADJUSTMENT OF CLAIMUnited States of America,  
Territory of Alaska,  
Third Judicial Division—ss.

Carl E. Jenkins, being first duly sworn, upon his oath deposes and says:

That he is the above-named applicant. That he is a married man and has one child who was dependent at the time of his injury hereinafter mentioned, and is now of the age of nineteen years. That applicant Carl E. Jenkins was employed by Chugach Electric Association on the 21st day of September, 1950, and for approximately ten months prior to that date.

That affiant on the 21st day of September, 1950, while within the scope and course of his employment was injured by an electrical burn to the ex-

tent that applicant lost his left arm and his right leg below the knee and four toes on this left foot. That as a result of his injuries applicant has been totally and permanently disabled from carrying on his occupation as an electrical lineman and has not been able to follow his trade in any manner whatsoever.

That as will appear from the records and files in this matter, decision and award was entered under date of November 12, 1952. That affiant had James Swan, attorney at law, of Anchorage, Alaska, as his attorney representing him in this matter and that such attorney informed affiant on numerous occasions that he would take the necessary steps to secure a review of the award as made by the Industrial Board with the District Court and on later occasions such attorney in several instances informed affiant that he had taken the necessary steps to secure court review of the court award and that such statements were made in the presence of disinterested witnesses. That as a matter of fact as affiant is informed and believes and so alleges the fact to be, no such action was instituted by his attorney or if an action was instituted affiant has been unable to learn where or when such action was taken. As a matter of fact affiant is totally and permanently disabled without adequate compensation as contemplated by the provisions of Law.

That affiant was advised by his doctor in the month of November of 1953, that the bone in his left leg was deteriorating to the extent that he would certainly need further medical attention and



probably would need other operations and affiant finds that such leg is giving him so much trouble that it would be impossible for him to hold down any sort of any position whether as a watchman or whatever it might be even if he were able to secure such job.

That affiant believes that in equity and good conscience and in accordance with law he is entitled to have this matter reopened on his application for adjustment of claim and to have his case reviewed in the light of medical testimony as to his present condition.

/s/ CARL E. JENKINS.

Subscribed and sworn to before me this 16th day of December, 1953.

[Seal] /s/ EDWARD V. DAVIS,  
Notary Public for Alaska.

My commission expires: 11-7-1954.

Receipt of Copy acknowledged.

---

Anchorage Medical & Surgical Clinic  
Fourth Ave. and L St., 1121 Fourth Avenue  
Anchorage, Alaska

December 17, 1953.

To Whom it May Concern:

Re: Carl E. Jenkins.

By review of this man's lengthy record, you will discover that he lost an arm and a leg and part of



the other foot as a result of an "Electrical burn" on September 21, 1950.

It is a well known fact that injuries of this kind are extensive, severe and long in recovery. I have seen Mr. Jenkins regularly since the date of his injury except for the time he spent in Seattle under the care of Doctor Louis Edmunds.

As it stands today, Mr. Jenkins' remaining foot is relatively useless but is improving. This foot is unhealed and requires attention regularly.

As far as I am concerned, Mr. Jenkins is disabled and unable to be gainfully employed since date of injury, because he has been under treatment. The fact that he has been up and about and able to do a few gainful things does not alter this estimation a bit.

In my opinion he will require rehospitization for a sympathectomy, re-amputation and plastic repair to the ailing foot. This will restore him to a state of permanent partial disability. After this he should be able to make some sort of a living.

/s/ HOWARD G. ROMIG,

HOWARD G. ROMIG, M.D.

HGR/k

[Stamped]: Received December 24, 1953.

In the District Court for the District of Alaska  
Division Number One, at Juneau  
Civil Action File No. 6994—A.

**CHUGACH ELECTRIC ASSOCIATION, INC.,**  
a Corporation, and **GENERAL ACCIDENT  
FIRE & LIFE ASSURANCE CORPORA-  
TION, LTD.,** a Corporation,  
Plaintiffs,

vs.

**ALASKA INDUSTRIAL BOARD,** Composed of  
the Territorial Commissioner of Labor, **HENRY  
A. BENSON,** the Territorial Insurance Com-  
missioner, **NEIL F. MOORE,** and the Attor-  
ney General of Alaska, **J. GERALD WIL-  
LIAMS;** and **CARL E. JENKINS,**

Defendants.

**AMENDED COMPLAINT AND APPEAL FROM  
DECISION AND AWARD OF ALASKA  
INDUSTRIAL BOARD UNDER THE  
WORKMEN'S COMPENSATION ACT OF  
ALASKA**

Plaintiffs appeal to the District Court for the  
District of Alaska from that certain Decision and  
Award of January 8, 1954, of the Defendant Alaska  
Industrial Board, and complain and allege as fol-  
lows:

**I.**

That Plaintiff Chugach Electric Association, Inc.,  
is a corporation duly organized and existing under  
the laws of the Territory of Alaska; that Plaintiff

General Accident Fire and Life Assurance Corporation, Ltd., is an insurance corporation duly authorized to transact the business of Workmen's Compensation Insurance in the Territory of Alaska;

## II.

That the Defendant Alaska Industrial Board, hereinafter designated as "Board," was created and now exists by virtue of Sections 43-3-1, through 43-3-31, A.C.L.A. 1949, was amended by Chapter 60, Alaska Session Laws 1953, which became effective on June 24, 1953, which sections and chapter are known as the Workmen's Compensation Act of Alaska, under which Act said Board's membership is composed of Defendants the Territorial Commissioner of Labor, Henry A. Benson, the Territorial Insurance Commissioner, Neil F. Moore, and the Attorney General of Alaska, J. Gerald Williams;

## III.

That the relationship of employer and employee existed between Plaintiff Chugach Electric Association, Inc., and Defendant Carl E. Jenkins on September 21, 1950, who on August 18, 1951, filed with said Board his Application for Adjustment of Claim, a true copy whereof is hereunto attached, marked Exhibit 1, and made a part hereof; that subsequently on or about August 28, 1951, said Board, without notifying Plaintiffs, returned said Application to said Defendant Jenkins;

## IV.

That Plaintiff Chugach Electric Association, Inc., on or about September 7, 1951, filed its written

Admission of Service and Answer to Application, a true copy whereof is hereunto attached, marked Exhibit 2, and made a part hereof;

#### V.

That on or about December 10, 1951, said Defendant Jenkins filed with said Defendant Board his written Amended Application for Adjustment of Claim for payment of compensation under said Workmen's Compensation Act; that a true copy of said Amended Application is attached hereto, marked Exhibit 3, and made a part hereof;

#### VI.

That on November 12, 1952, one member of said Board, namely, said Defendant Henry A. Benson, made and entered in the proceedings upon said Application and Answer his Decision and Award, a true copy whereof is hereunto attached, marked Exhibit 4, and made a part hereof;

#### VII.

That on February 6, 1953, after a review and hearing by the full membership of said Board, it made its Decision and Award, a true copy whereof is hereunto attached, marked Exhibit 5, and made a part hereof;

#### VIII.

That thereafter, in pursuance to said Decision and Award of February 6, 1953, Plaintiffs paid said Defendant Jenkins the sum of \$8,100.00 in full payment of his total permanent disability and

\$476.70 in payment of his temporary disability compensation allowed by said Decision and Award of February 6, 1953, in addition to medical, surgical, and hospital expenses of \$15,204.78;

#### IX.

That on or about November 21, 1953, said Defendant Jenkins filed with said Defendant Board his written Application for Adjustment of Claim bearing said date, a true copy whereof is hereunto attached, marked Exhibit 6, and made a part hereof, which is based upon the identical injury and identical accident for which the Defendant Board's Decision and Award of February 6, 1953, awarded said Defendant Jenkins temporary disability compensation of \$476.70 and total permanent disability compensation of \$8,100.00, which temporary disability and total permanent disability compensation Plaintiffs heretofore paid;

#### X.

That on or about December 9, 1953, the Plaintiffs filed with Defendant Board their written Motion and Answer, a true copy whereof is hereunto attached, marked Exhibit 7, and made a part hereof; that none of the facts in said Motion and Answer have ever been controverted;

#### XI.

That in disregard to Plaintiffs' said Motion and Answer, the Defendant Board on December 28, 1953, held a hearing upon said Defendant Jenkins' Application of November 21, 1953, and thereafter

and on January 8, 1954, rendered its Decision, a true copy whereof is hereunto attached, marked Exhibit 8, and made a part hereof;

## XII.

That said Decision and Award of Defendant Board of January 8, 1954, is erroneous in that:

(1) The Board had no jurisdiction to hold a hearing upon said Jenkins' Application of November 21, 1953, (Exhibit 6) or to hold a rehearing either upon his Application of August 14, 1951, (Exhibit 1), or upon his Amended Application (Exhibit 2), or to render its Decision of January 8, 1954, (Exhibit 8);

(2) Defendant Board's Decision and Award of February 6, 1953, (Exhibit 5) is *res judicata*, and the Board had no jurisdiction, power or authority, after its rendition thereof, to amend, alter, or change the terms and conditions, set aside or modify its Decision of February 6, 1953, which it did by its Decision and Award of January 8, 1954;

(3) The Defendant Board has no power or authority after having made its Decision and Award of February 6, 1953, that said Jenkins was entitled to temporary disability compensation of \$476.70 from the date of his injury on September 21, 1950, until October 28, 1950, and that he had suffered permanent total disability on October 28, 1950, for which, under said Act as then in force, he was entitled to be paid \$8,100.00, which temporary and permanent disability compensation Plaintiffs here-



tofore paid and from which said Decision and Award said Jenkins did not appeal to the District Court for the District of Alaska within 30 days after the rendition thereof or at all, to subsequently hold and decide on January 8, 1954, or ever, that, after having suffered said permanent total disability on October 28, 1950, he had suffered on October 29, 1950, and still continues to suffer, temporary total disability from the same injuries for which Plaintiffs paid him compensation in full in accordance with the said Board's Decision and Award of February 6, 1953;

(4) Said Jenkins' Application for Adjustment of Claim, dated November 21, 1953, (Exhibit 6), was not filed with the Defendant Board within two years from the date of his injury on September 21, 1950;

(5) Said Jenkins did not make or present any claim to the Defendant Board, within three years after the date of his injury on September 21, 1950, for modification of the compensation awarded him by the Defendant Board's Decision and Award of February 6, 1953;

(6) Said Act does not authorize or empower the Defendant Board, after having awarded total permanent disability compensation to said Jenkins, to subsequently award to him temporary disability compensation for temporary disability arising and continuing after the date October 28, 1950, on which, by its Decision and Award of February 6, 1953, the Defendant Board found and decided that he had



suffered total permanent disability for which it awarded total permanent disability compensation of \$8,100.00 which Plaintiffs paid and from which said Decision and Award said Jenkins did not appeal within 30 days, or ever, to the District Court for the District of Alaska.

(7) The findings of Defendant Board in its Decision and Award of February 6, 1953, are conclusive not only upon the Board itself but also upon this Court, and the Board had no jurisdiction, power or authority to subsequently alter, amend, set aside or modify them.

### XIII.

Plaintiffs present this Appeal in good faith and not with the intent to fail or refuse to pay to said Jenkins such, if any, sums as may be legally awarded him; Plaintiffs have been advised by legal counsel that the Defendant Board's Decision of January 8, 1954, is invalid and contrary to the law.

Wherefore Plaintiffs pray that the Defendant Board's Decision of January 8, 1954, may be entirely suspended and set aside and that the Defendants may be permanently enjoined from doing any act or thing to compel Plaintiffs to pay any sum whatsoever to said Defendant Jenkins under or by force of said Decision and may be temporarily stayed from so doing pending this litigation and final decision on Plaintiffs' Amended Complaint and Appeal.

Dated at Juneau, Alaska, February 19, 1954.

ROBERTSON, MONAGLE &  
EASTAUGH,

By /s/ R. E. ROBERTSON,  
Attorneys for Plaintiffs.

EXHIBIT No. 1

Territory of Alaska  
Alaska Industrial Board

Application for Adjustment of Claim  
Alaska Workmen's Compensation Act

CARL JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC COMPANY.

1. Carl Jenkins, while employed as Electrician, on September 21, 1950, at Anchorage, Alaska, by Chugach Electric Company, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Working hot voltage—putting addition on sub station, electrified, resulting in left foot burnt, right arm and right arm amputated.

2. Injured left work on Sept. 21, 1950, and disability continued to present.

3. Last payment of compensation on June 23;

Last medical furnished by employer on: Still under physician. Notice of injury given employer on Sept. 21, 1950.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Alaska; Dr. Edmunds, Seattle, Washington.

5. Employee's wages were \$3.10 per hour, working 48 hours per day, . . . . days per week.

6. Total compensation paid to date \$3,600.00 approximate.

7. Injured was married and had two (2) dependents, as follows: wife, Doris C., son, Carl Edward.

8. (To be Used in Death Cases Only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: award for total permanent disability adjustment of permanent payments.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Alaska, August 14th, 1951.

/s/ CARL E. JENKINS.

/s/ JAMES E. SWAN,

Agent or Attorney for Applicant if Applicant represented.

EXHIBIT No. 2

Alaska Workmen's Compensation Act

Territory of Alaska  
Alaska Industrial Board

CARL E. JENKINS,

Applicant;

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
and GENERAL ACCIDENT FIRE & LIFE  
ASSURANCE CORPORATION, LTD.,

Defendants.

ADMISSION OF SERVICE AND ANSWER TO  
APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.
3. It is admitted that the relationship of employer and employee existed at the time of injury.
4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.
5. It is admitted that Notice of Injury was given employer as set forth in application.

6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is admitted that the applicant was permanently disabled to the extent shown in application, namely left arm amputated above elbow; right leg amputated at mid-calf; and left foot lost all toes except fifth.

8. It is denied that the rate of wages as set forth in the application is correct, and that the correct rate was \$2.80 per hour.

Applicant has been paid \$8,100.00 compensation, which is the total compensation which he is entitled to receive, and defendants have also paid \$15,204.78 for medical, surgical and hospital expenses. Defendants will insist that all evidence be adduced in a legal manner and that no ex parte, hearsay or incompetent evidence of any kind be admitted at any hearing held on the claim.

**CHUGACH ELECTRIC ASSOCIATION, INC.,  
and GENERAL ACCIDENT-FIRE & LIFE  
ASSURANCE CORPORATION, LTD.,**

**Defendants.**

By /s/ **R. E. ROBERTSON,**

**Attorney for Defendants.**

**Dated at Juneau, Alaska, September 7, 1951.**

**Note.—State under item 9 any other material facts which will clarify the position you take. If any statements are later found to be incorrect you may file an amended answer. Use other side if necessary.**

EXHIBIT No. 3

Territory of Alaska  
Alaska Industrial Board

Alaska Workmen's Compensation Act

CARL JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC COMPANY,

Defendant.

AMENDED APPLICATION FOR  
ADJUSTMENT OF CLAIM

1. Carl Jenkins, while employed as electrician, at Anchorage, Alaska, by Chugach Electric Company, who is subject to the Act, sustained injury, arising out of and in the course of said employment as follows: Working hot voltage—putting addition on sub-station electrocuted, resulting in left foot burnt, right arm and right leg amputated.

2. Injured, left work on Sept. 21, 1950, and disability continued to present.

3. Last payment of compensation on June 23; last medical furnished by employer on: Still under physician. Notice of injury given employer on Sept. 21, 1950.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Dr. Edmonds, Seattle, Washington.

5. Employee's wages were \$3.10 per hour, working 48 hours per day, . . . days per week.

6. Total compensation paid to date: \$8,100.00.

7. Injured was married and had two (2) dependents, as follows: wife, Doris C.; son, Carl Edward.

8. (To be used in death cases only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed, and the reason for filing this application is:

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Alaska, August 14, 1951.

/s/ CARL E. JENKINS.



EXHIBIT No. 4

Alaska Industrial Board

Juneau, Alaska

Docket No. 152

Case No. 0-9-370

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION, and  
GENERAL ACCIDENT FIRE & LIFE AS-  
SURANCE CORP., LTD.,

Defendants.

DECISION AND AWARD

This matter comes on for decision pursuant to an application filed by Carl E. Jenkins. From the files and records in the case, Board Member Henry A. Benson, finds as follows:

Facts

Applicant Carl E. Jenkins, a married man with one dependent child was employed as an electrician by the Chugach Electric Association, an employer subject to the Alaska Workmen's Compensation Act and who had insured his liability with General Accident Fire & Life Assurance Corporation, named as defendants herein. While so employed on September 21, 1950, applicant suffered an accident which resulted in severe electrical burns requiring

the amputation of the left arm above the elbow, amputation of the right leg at mid calf, and amputation of all toes on the left foot except the fifth-toe.

Applicant was hospitalized at the Providence Hospital at Anchorage and on September 28 was hospitalized at the Virginia Mason under the care of Doctor Edmunds at Seattle. Following the amputations performed by Dr. Edmunds, applicant was fitted with prosthesis of right arm and right leg.

Temporary disability compensation was paid in the total sum of \$3,645.00 at the rate of \$95.34 per week for a period of approximately thirty-eight weeks. Applicant has had a continuing disability as the result of the failure of the left foot to heal and has continued under the care of Dr. Romig to the present time. Medical reports filed by physicians who have treated him show:

Doctor: J. H. Stewart—June 29, 1951.

Summary—"Treated from 3-31-51 to 6-28-51. At present time left foot is improving, but whether it can be permanently preserved without amputation is still a moot question otherwise his progress is slow but satisfactory."

Doctor: H. G. Romig—June 29, 1951.

Summary—"Further treatment needed."

Doctor: H. G. Romig—August 17, 1951.

Summary—"The right leg is largely useless due to a slowly-healing foot wound. Furthermore the foot and ankle on this side are almost

without sensation even though healed over by scar."

"The man is totally disabled. The foot will heal in a matter of months—how many I cannot say. When healed he will be disabled to a very, very high degree."

Doctor: H. G. Romig—May 2, 1952.

Summary—"This man was injured 9-21-50, while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

"The right leg and left arm with artificial limbs work as well as could be expected. The left foot however has failed to heal. Any use of the foot causes breakdown and slough of the tissues.

"On the whole the circulation of the left foot is better. Yet weight bearing causes necrosis and slough.

"My plans for treatment would encompass any or possibly all the following procedures: (1) rehospitiation, (2) sympathectomy, (3) reamputation and (or) large thick graft.

"I estimate that these procedures would be time consuming and very expensive; and yet they will be necessary to restore him to some

percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an outpatient. I believe the above-outlined procedures should be instituted soon."

Permanent total disability compensation in the amount of \$8,100.00 was paid on July 25, 1951, but from that indemnity the insurance carrier withheld the sum of \$3,645.00 which previously had been paid as temporary disability compensation.

No further compensation for temporary disability was paid although no medical and result had been obtained or has been obtained to this date.

Compensation for temporary total disability for the entire period of such disability after thirty-eight weeks is now due applicant, and, in addition thereto, the sum of \$3,645.00 previously withheld from the statutory payment for loss of one arm and leg.

#### Award

From the foregoing facts applicant Carl E. Jenkins is awarded the sum of \$8,100.00 (Eight thousand one hundred dollars), for the permanent loss of one arm and one leg, less the sum of \$4,455.00 (Four thousand four hundred fifty-five dollars), previously paid. Applicant is further awarded compensation for temporary total disability for the period of temporary disablement caused by the failure of his left foot to heal and until a medical end result is reached.

Applicant's attorney's fee is hereby fixed at \$750.00 (Seven hundred fifty dollars).

/s/ HENRY A. BENSON,  
Commissioner.

Dated at Juneau, Alaska, November 12, 1952.

**Certification**

I hereby certify the above and foregoing to be a full, true, and correct copy of the Board Decision and Award issued in the case of Carl E. Jenkins v. Chugach Electric Association and General Accident Fire & Life Assurance Corp., Ltd., Case No. 0-9-370, Docket No. 152.

/s/ S. M. KENNEDY,  
For Henry A. Benson,  
Chairman.

**EXHIBIT No. 5****Alaska Industrial Board****Juneau, Alaska****Case No. 0-9-370****Docket No. 152****CARL E. JENKINS,****Applicant,****vs.****CHUGACH ELECTRIC ASSOCIATION and/or  
GENERAL ACCIDENT FIRE & LIFE AS-  
SURANCE CORP., LTD.,****Defendants.****DECISION AND AWARD ON REVIEW OF  
FULL BOARD AND ORDER SETTING  
ASIDE THE AWARD MADE ON NOVEM-  
BER 12, 1952, BY HEARING MEMBER  
HENRY A. BENSON**

The Decision and Award entered on November 12, 1952, by hearing member Henry A. Benson is hereby set aside and the Board finds that as a result of an accidental injury on September 21, 1950, while employed by the Chugach Electric Association, applicant Carl E. Jenkins suffered temporary total disability during the period September 21, 1950, to October 28, 1950. On approximately October 28, 1950, applicant had the third and final amputation which resulted in the loss of the right arm and leg and all toes except the fifth on the left foot, and

under the provisions of Section 43-3-1 (Loss of Members as Permanent Disability), suffered a total permanent disability. His condition having been rated as a total permanent disability on that date, no compensation for total temporary disability is there-  
after payable.

**Award**

On the basis of the foregoing findings of fact, the Board awards Carl E. Jenkins compensation in the sum of \$476.70 representing temporary total disability compensation for a period of 35 days.

.....  
**NEIL F. MOORE.**

.....  
**J. GERALD WILLIAMS.**

Juneau, Alaska, February 6, 1953.

**Certificate**

I hereby certify the foregoing to be a true and correct copy of Decision and Award on Review of Full Board and Order Setting Aside the Award Made on November 12, 1952, by Hearing Member Henry A. Benson in the case of Carl E. Jenkins vs. Chugach Electric Association and/or General Accident Fire & Life Assurance Corp., Ltd., Case No. 0-9-370, Docket No. 152.

/s/ **HENRY A. BENSON,**  
**Chairman.**



## EXHIBIT No. 6

Territory of Alaska

Alaska Industrial Board

Application for Adjustment of Claim.

Alaska Workmen's Compensation Act

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION &  
GENERAL ACCIDENT FIRE & LIFE  
ASSURANCE CORP., LTD.,

Defendant.

1. Carl E. Jenkins, while employed as lineman on Sept. 21, 1950, at Anchorage, Alaska, by Chugach Electric Assn., who is subject to the Act, sustained injury arising out of and in the course of said employment, resulting in electrical burns, resulting in loss of left arm, badly burned left foot. Four toes on left foot amputated. Right leg amputated below knee.

2. Injured, left work on 9/21/50, and disability continued to present time.

3. Last payment of compensation on .....; last medical furnished by employer on Sept. 21, 1951. Notice of injury given employer immediately.

4. Medical and surgical treatment has been rendered by Dr. Romig, Anchorage, Aaa., Dr. Ed-

munds, Virginia Mason Hospital, Seattle, Wash.; furnished by Chugach Electric Association, Anchorage, Aaa.

5. Employee's wages were \$3.10 per hour, working 3 hours per day, 6 days per week.

6. Total compensation paid to date, \$8,100.00. (Received additional check, \$476.00, but not cashed.)

7. Injured was married and had 2 dependents, as follows: Doris C. Jenkins, wife; C. Edward Jenkins, son.

8. (To be used in death cases only.)

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: Believe entitlement to temporary disability, until there is an end to disability, through medical means. Opinion based Court Case No. 12, Alaska No. 584, Libby, McNeil, Libby, Alaska Indus. Board.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Anchorage, Nov. 21, 1953.

/s/ CARL E. JENKINS.

## EXHIBIT No. 7

Territory of Alaska  
Alaska Industrial Board

Case No. 0-9-370

Docket No. 152

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC ASSOCIATION and  
GENERAL ACCIDENT FIRE & LIFE  
ASSURANCE CORPORATION, LTD.,

Defendants.

## MOTION AND ANSWER

Chugach Electric Association and General Accident Fire & Life Assurance Corporation, Ltd., hereby move to strike and answer that certain Application for Adjustment of Claim dated November 21, 1953, made by Carl E. Jenkins, for the reasons and as follows:

On February 6, 1953, the Alaska Industrial Board rendered its Decision and Award, finding that applicant Jenkins had suffered temporary total disability during the period September 21, 1950, to October 28, 1950, and on October 28, 1950, had suffered total permanent disability under the provisions of Section 43-3-1, A. C. L. A. 1949, and that Jenkins was entitled to temporary disability compensation of \$476.70; that in accordance with said Decision and Award, the defendants heretofore paid Jenkins \$8,100.00 in full payment of his total per-

manent disability compensation, and also gave him a draft, payable in lawful money of the United States of America, for \$476.70, in full payment of the temporary total disability so awarded him by the Board;

That in his said Application, said Jenkins admits he has been paid said \$8,100.00 and also that he had received said additional check for \$476.70, but had not cashed it;

That said Jenkins never took any appeal from the Board's Decision and Award of February 6, 1953, to the District Court for the Territory of Alaska;

That said draft for \$476.70 is still valid and will be honored upon presentment for payment;

That the Board's said Decision and Award of February 6, 1953, is res judicata; that the defendants have fully complied with its provisions; and that the Board has no jurisdiction of the claim asserted by said Jenkins in his said application of November 21, 1953, which is based upon the same injury upon which was based said Jenkins' original application, upon which the Board awarded him compensation in its said Decision and Award of February 6, 1953.

Dated at Juneau, Alaska, December 9, 1953.

ROBERTSON, MONAGLE &  
EASTAUGH.

By /s/ R. E. ROBERTSON,  
Attorneys for Defendants.

## EXHIBIT No. 8

Alaska Industrial Board

Juneau, Alaska

Case No. 0-9-370

Docket No. 252

CARL E. JENKINS,

Applicant,

vs.

CHUGACH ELECTRIC CO., and/or GENERAL  
ACCIDENT FIRE & LIFE ASSURANCE  
CO., LTD.,

Defendants.

## DECISION

This matter came on to be heard by the Full Board pursuant to the Application of Carl E. Jenkins. Applicant was represented by attorney John Dimond and defendants by attorney R. E. Robertson of counsel Robertson, Monagle & Eastaugh.

## Decision

From the files and records in the case and medical reports the Full Board finds a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached.

/s/ HENRY A. BENSON,  
Chairman.

/s/ NEIL F. MOORE.

/s/ J. GERALD WILLIAMS.

January 8, 1954.

**Certification**

I hereby certify the above and foregoing to be a full, true and correct copy of the Decision in the case of Carl E. Jenkins vs. Chugach Electric Co., and/or General Accident Fire & Life Assurance Co., Ltd., Case No. 0-9-370, Docket No. 252.

/s/ HENRY A. BENSON.

January 8, 1954.

[Endorsed]: Filed February 20, 1954.

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In the District Court for the District of Alaska,  
Division Number One, at Juneau

No. 6994-A

**CHUGACH ELECTRIC ASSOCIATION, INC., a  
Corporation, et al.,**

**Plaintiffs,**

**vs.**

**ALASKA INDUSTRIAL BOARD and CARL E.  
JENKINS,**

**Defendants.**

**ANSWER OF DEFENDANT  
CARL E. JENKINS**

Defendant, Carl E. Jenkins, answers plaintiff's complaint as follows:

1. Defendant admits all the material allegations contained in paragraphs 1, II, IV, V, VI, VII, IX, and XI.

2. Answering paragraph III, defendant admits all the material allegations contained therein with the exception of the allegation "that subsequently on or about August 28, 1951, said Board, without notifying Plaintiffs, returned said Application to said Defendant Jenkins"; with respect to such allegation, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

3. Answering paragraph VIII, defendant admits that he was paid the sums of \$8,100.00 and \$476.70, respectively, but denies that both payments were made after the Decision and Award of February 6, 1953. The real facts with respect to such payments are: Following the accident of September 21, 1950, temporary disability compensation payments were made to defendant at the rate of \$95.34 per week for approximately 38 weeks, until the total sum of \$3,645.00 had been paid; at this time such payments were discontinued by the insurance carrier above named on the advice of counsel. Thereafter, on July 21, 1951, said carrier paid defendant the sum of \$4,455.00, this representing the amount that he was entitled to under law for total and permanent disability (\$8,100.00) minus payments previously made for temporary disability compensation (\$3,645.00). The \$476.70 was paid to defendant following the Decision and Award of February 6, 1953.

Regarding the allegation in paragraph VIII as to medical, surgical and hospital expenses in the sum of \$15,204.78, defendant is without knowledge



or information sufficient to form a belief as to the truth of such allegation and therefore denies the same.

4. Answering paragraph X, defendant admits the allegations therein with the exception of the allegation "that none of the facts in said Motion and Answer have ever been controverted," which allegation defendant denies.

5. Defendant denies the allegations contained in paragraph XII.

6. Defendant admits the allegations in paragraph XIII.

Wherefore, defendant prays that plaintiffs' complaint be dismissed and the Decision of the Alaska Industrial Board of January 8, 1954, be affirmed.

Dated at Juneau, Alaska, this 1st day of March, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Defendant,  
Carl E. Jenkins.

Copy received this 1st day of March, 1954.

ROBERTSON, MONAGLE &  
EASTAUGH.

By. /s/ M. E. MONAGLE,  
Attorneys for Plaintiffs.

/s/ J. GERALD WILLIAMS,  
Attorney General of Alaska.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

## OPINION

Dated July 27, 1954

The question presented by this controversy is whether, after making an award for permanent total disability for the loss of an arm and a leg, the Industrial Board is precluded at a later date from allowing benefits for temporary disability because of the failure of an additional injury, concurrently sustained, to heal.

On July 21, 1950, the employee received an electrical shock and was severely burned. On October 28, 1950, the left arm, right leg, and four toes of the left foot were amputated. On November 12, 1952, the Board, by one member, awarded him the maximum of \$8,100.00 for permanent total disability and the statutory allowance for temporary total disability until his foot healed. On February 6, 1953, this award was vacated by the other members of the Board who found that the employee was entitled to temporary total disability from the date of his injury to October 28, 1950, only, when, according to its findings, he became permanently and totally disabled. On November 21, 1953, the employee applied for temporary disability benefits which he asserted he was entitled to receive until his foot healed. On January 8, 1954, over the objections of the employer and insurer, the Board granted this application.

The burns received by the employee were severe, necessitating medical, hospital, surgical, and other services at a cost of more than \$15,000.00, which the employer has paid. It perhaps should be noted at this point that, if the decision of the Board is affirmed, the additional temporary disability benefits will amount to more than \$15,000.00.

The plaintiffs contend: (1) that the Board has no power to grant a rehearing; (2) that the decision of February 6, 1953, is res judicata of the proceedings on the application of November 21, 1953; (3) that the application of November 21, 1953, was barred by the limitations of the statute governing the initial filing of claims and their subsequent modification; and (4) that no award for temporary disability may be made after a finding of permanent total disability.

The defendants contend that the award may be sustained under the provisions of Sec. 43-3-4, ACLA 1949, vesting continuing jurisdiction in the Board over every claim, together with power to modify its awards. No authority is cited for or against the proposition that, where injuries, sufficient by themselves to constitute permanent total disability, are the basis of the maximum award for such disability, an allowance may nevertheless thereafter be made for temporary disability based on the failure of an additional injury, concurrently sustained, to heal; and it may well be doubted whether any authority exists in view of the extraordinary nature of the factual situation.

I am of the opinion that the award must be set aside. The failure of the foot to heal was known not only after the expiration of the normal period for healing but also after the expiration of 38 months, when the instant award was made. The power vested in the Board under Sec. 43-3-4 to modify its awards may be invoked only upon a showing of a subsequent development warranting the exercise of that power. Even if it could be held that the failure of the foot to heal between February 6, 1953, and November 21, 1953, was such a subsequent development, it is not perceived how, after the maximum allowance for permanent total disability had been made on February 6, 1953, an allowance for temporary disability could thereafter be made either under Sec. 43-3-1 or Sec. 43-3-4. Permanent total disability is the ultimate in disability under the law. Further injury, concurrently sustained, could not add to or increase that degree of statutory disability, although it might well show a greater degree of actual disability.

The difficulty with the defendants' case here is that it apparently confuses the two kinds of disability, whereas the law concerns itself with only one. Perhaps the Board could have kept the employee in a temporary disability status until all his injuries, those which in themselves were sufficient to constitute permanent total disability, before making a finding of permanent total disability, well as the injury to the foot, had healed or become permanent total disability under the law, as

disability. Having failed to do so, it may not thereafter make a finding of the existence of a lesser degree of disability and allow compensation therefor, because obviously such lesser degree is included in the greater.

It will be noted that the law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability. While this might have been an oversight upon the part of the Legislature, it could also have been an intentional omission in view of the fact that, since the body functions as a unit, it would be illogical to deal separately with an injury which it is not necessary to take into account in finding permanent total disability and allocate to such additional injury a lesser degree of disability. No prejudice results from such an omission, because the employer is required to furnish medical, surgical-hospital, and other services, except where the injured employee, as in the instant case, requires treatment beyond the period of time for which such services are required to be furnished.

I am of the opinion, therefore, that under the law of Alaska the only remedy afforded, where there is a failure to heal after an allowance has been made for permanent total disability, is that provided by Sec. 43-3-2. In the instant case it appears that the employer complied with the provisions of that section for more than the statutory period and that, even with the extension in 1953, of this period from

one to two years, it would still be insufficient for this case.<sup>2</sup> It thus appears that, in permitting the Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized, ample provision has been made for cases in which the disability is less than permanently total but that no provision has been made for cases in which there is a failure to heal after a finding of permanent total disability. Such being the state of the law, the Court has no alternative but to set aside the award appealed from.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed July 27, 1954.



In the U. S. District Court for the District of  
Alaska, Division Number One, at Juneau

No. 6994-A

**CHUGACH ELECTRIC ASSOCIATION, INC., a  
Corporation, and GENERAL ACCIDENT  
FIRE & LIFE ASSURANCE CORPORA-  
TION, LTD., a Corporation,**

**Plaintiffs,**

**vs.**

**ALASKA INDUSTRIAL BOARD, Composed of  
the Territorial Commissioner of Labor,  
HENRY A. BENSON, the Territorial Insur-  
ance Commissioner, NEIL F. MOORE, and the  
Attorney General of Alaska, J. GERALD  
WILLIAMS; and CARL E. JENKINS,**

**Defendants.**

### **JUDGMENT AND DECREE**

This cause, by agreement of counsel for the respective parties, having heretofore been submitted upon briefs of counsel for the respective parties, upon plaintiff's appeal from the Decision of the Alaska Industrial Board, of January 8, 1954, the Alaska Industrial Board appearing not, and the Court having on July 27, 1954, made and filed its written Opinion herein, and being now fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the Alaska Industrial Board's Decision made



and entered on January 8, 1954, be and it is hereby vacated and set aside, and the defendant Alaska Industrial Board and its members Henry A. Benson, Neil F. Moore, and J. Gerald Williams, and the defendant Carl E. Jenkins be and they are hereby permanently enjoined from doing any act or thing to compel plaintiffs to pay any sum whatsoever to said defendant Jenkins under or by virtue of said Board's Decision of January 8, 1954.

Done in open Court this 30th day of July, 1954.

/s/ GEORGE W. FOLTA,  
Judge.

[Endorsed]: Filed in Open Court July 30, 1954.

---

[Title of District Court and Cause.]

### MOTION FOR REHEARING

Defendant, Carl E. Jenkins, moves that the judgment and decree entered herein be vacated and set aside and that a rehearing be granted upon the following grounds:

1. That the Court was in error in holding, as it appears from its written opinion, that the law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability.

2. That the Court was in error in holding, as it appears from its written opinion, that the law does not permit the Alaska Industrial Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized in

those cases in which there is a failure to heal after a finding of permanent total disability.

Dated at Juneau, Alaska, this 3rd day of August, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant,

Carl E. Jenkins.

Affidavit of Mailing attached.

[Endorsed]: Filed August 6, 1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that above-named defendants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on July 30, 1954.

Dated at Juneau, Alaska, this 29th day of October, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant,

Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska;

By /s/ EDWARD A. MERDES,

Assistant Attorney General, Attorney for Alaska  
Industrial Board.

[Endorsed]: Filed October 30, 1954.

[Title of District Court and Cause.] ~

MINUTE ORDER MADE ON OCTOBER 7, 1954

Defendant Jenkins' Motion for Rehearing having been submitted to the court on briefs, the court at this time rules that said motion for a rehearing was denied.

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[Title of District Court and Cause.]

COST BOND ON APPEAL

The above-named defendant, Alaska Industrial Board, as principal, and the American Surety Company of New York, a New York corporation, as surety, jointly and severally acknowledge that they and their successors and assigns are jointly and severally bound unto the above-named plaintiffs in the sum of \$250.00.

The condition of this bond is as follows:

Whereas, the defendant, Alaska Industrial Board, has appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on July 30, 1954;

Now, Therefore, if the said defendant, Alaska Industrial Board, shall prosecute its appeal to effect and pay all costs that may be adjudged against it if the appeal is dismissed or if the judgment is affirmed or modified, then this bond shall be void; otherwise, to be and remain in full force and effect.

Dated: November 2, 1954.

ALASKA INDUSTRIAL  
BOARD,

By /s/ HENRY A. BENSON,  
Chairman.

[Seal] AMERICAN SURETY  
COMPANY OF NEW YORK,

By /s/ JOSEPH A. McLEAN,  
Attorney in Fact.

[Endorsed]: Filed November 2, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That The Undersigned, Alaska Industrial Board, composed of the Territorial Commissioner of Labor, Henry A. Benson; the Territorial Insurance Commissioner, Neil F. Moore; and the Attorney General of Alaska, J. Gerald Williams; and Carl E. Jenkins, in the above-entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact business of surety in the Territory of Alaska, as Surety, are held and firmly bound unto the above-entitled Chugach Electric Association, Inc., a corporation, and General Accident Fire & Life Assurance Corporation, Ltd., a corporation, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the

United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and Sealed This 4th day of November, 1954.

Whereas, on the . . . . day of . . . . ., 19 . . . ., the above-entitled Court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named obligees and against the above-named principals;

And Whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the United States 9th Circuit Court of Appeals; and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such, that if the said appellants will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

[Seal]

.....  
 FIREMAN'S FUND  
 INDEMNITY COMPANY,

By /s/ ANN H. HODNETT,  
 Attorney-in-Fact.

[Endorsed]: Filed November 8, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON BY DEFENDANTS

Defendants propose on their appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that after defendant, Carl E. Jenkins, had received the maximum allowance for permanent total disability on February 6, 1953, that the Alaska Industrial Board could not thereafter make a finding of, and an allowance of compensation for, temporary disability either under Section 43-3-1 or 43-3-4, Alaska Compiled Laws Annotated, 1949.

2. The court erred in holding that permanent total disability is the ultimate disability under the Alaska Workmen's Compensation Law.

3. The court erred in holding that the Alaska Workmen's Compensation Law makes no provision for injuries sustained in addition to those which suffice to constitute permanent total disability.

4. The court erred in holding that under the Alaska Workmen's Compensation Law the only remedy afforded, where there is a failure to heal after an allowance has been made for permanent total disability, is that provided by Section 43-3-2, Alaska Compiled Laws Annotated, 1949.

5. The court erred in holding that the Alaska Workmen's Compensation Law does not permit the



Alaska Industrial Board to keep an injured employee in a temporary disability status until his condition has become fixed or stabilized in cases where there is a failure to heal after a finding has been made of permanent total disability.

6. The court erred in entering its judgment and decree of July 30, 1954, vacating and setting aside the Alaska Industrial Board's decision of January 8, 1954, and in enjoining the defendants from doing any act or thing to compel plaintiffs to pay any sum whatsoever to defendant, Carl E. Jenkins, under or by virtue of the said Board's decision of January 8, 1954.

7. The court erred in entering its minute order of October 7, 1954, denying defendants' motion for rehearing.

Dated at Juneau, Alaska, this 20th day of December, 1954.

/s/ JOHN H. DIMOND,

Attorney for Defendant

Appellant, Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska,

By /s/ EDWARD A. MERDES,

Assistant Attorney General; Attorney for Defendant-Appellant, Alaska Industrial Board.

Service of Copy acknowledged.

[Endorsed]: Filed December 21, 1954.



[Title of District Court and Cause.]

**CERTIFICATE OF CLERK**

United States of America,  
Territory of Alaska,  
First Division ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 8th day of January, 1955.

**J. W. LEIVERS,**

Clerk of the District Court;

By /s/ **P. D. E. McIVER,**

Chief Deputy Clerk of Court.

[Endorsed]: No. 14616. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board, Composed of Henry A. Benson, Territorial Commissioner of Labor; Neil F. Moore, Territorial Insurance Commissioner, and J. Gerald Williams, Attorney General of Alaska; and Carl E. Jenkins, Appellants, vs. Chugach Electric Association, Inc., a Corporation; and General Accident Fire and Life Assurance Corporation, Ltd., a Corporation, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, First Division.

Filed January 10, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14616

ALASKA INDUSTRIAL BOARD, Composed of  
the Territorial Commissioner of Labor, HEN-  
RY A. BENSON; the Territorial Insurance  
Commissioner, NEIL F. MOORE; and the At-  
torney General of Alaska, J. GERALD WIL-  
LIAMS; and CARL E. JENKINS,

Appellants.

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a Corporation, and GENERAL ACCIDENT  
FIRE & LIFE ASSURANCE CORPORA-  
TION, LTD., a Corporation,

Appellees.

APPELLANTS' STATEMENT OF POINTS  
AND DESIGNATION OF PARTS OF REC-  
ORD TO BE PRINTED

Appellants above named adopt the "statement of  
points to be relied upon by defendants," filed with  
the Clerk of the District Court, as their statement  
of points to be relied upon in the United States  
Court of Appeals for the Ninth Circuit, and pray  
that the whole of the record as filed and certified be  
printed.

Dated December 20, 1954.

/s/ JOHN H. DIMOND,

Attorney for Appellant,  
Carl E. Jenkins.

J. GERALD WILLIAMS,

Attorney General of Alaska;

By /s/ EDWARD A. MERDES,

Attorney for Appellant,  
Alaska Industrial Board.

Service of Copy acknowledged.

[Endorsed]: Filed January 10, 1955.

No. 14616

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

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**ALASKA INDUSTRIAL BOARD,** Composed of  
**HENRY A. BENSON,** Territorial Commissioner of Labor; **NEIL F. MOORE,** Territorial Insurance Commissioner, and **J. GERALD WILLIAMS,** Attorney General of Alaska, and **CARL E. JENKINS,**

Appellants,

VS.

**CHUGACH ELECTRIC ASSOCIATION, INC.,** a Corporation, and **GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD.,** a Corporation,

Appellees.

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**Supplemental**  
**Transcript of Record**

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**Appeal from the District Court for the District of Alaska**  
**First Division**

## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Form AIB No. 104AB

Final Report

Physician's Report of Injury

to the

Territory of Alaska

Alaska Industrial Board

Box 2141 Juneau

This report to be filed forthwith  
after first attendance.

The Patient

1. Name of Injured Person: Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age:
42. Married or Single: M. Sex: M.
2. Address: ..... City or Town:  
Anchorage, Aaa.
3. Name of Employer: Chugach Electric Assn.  
Business: Elec. Distribution.
4. Address of Employer: Box 488. City or Town:  
Anchorage.
5. Insured by: Name of Company: Bud Nock,  
Box 1313, Anchorage.

The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m.  
Date disability began: 9-21-50.
7. State in patient's own words where and how  
accident occurred: Working on 12,000-volt stuff,  
came to on the ground.

The Injury

8. Give accurate description of nature and extent  
of injury and state your objective findings: 3rd de-



gree burns of left arm at the elbow down to the bone, no pulse, no sensation of the lower arm. Deep 2nd and 3rd degree burns of the left upper arm, elbow to axilla. 2nd degree burns of right forearm. 3rd degree burns of both feet, with varying degrees up ankles.

9. Will the injury result in (a) Permanent defect? Yes. If so, what? Loss of toes and feet in part. Loss of left lower arm. (b) Facial or head disfigurement? No.

10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes .....

11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? Yes. Give particulars: Temporary cardiac irregularity after accident. Did accident aggravate this condition? .....

12. Has patient any physical impairment due to previous accident or disease? No. Give particulars .....

13. Has normal recovery been delayed for any reason? No. Give particulars .....

#### Treatment

14. Date of your first treatment: 9-21-50. Who engaged your services? Employer.

15. Describe treatment given by you: Sterile debridement and dressing, antibiotics topically and systemically, plasma, glucose, morphine.

16. Were X-rays taken? No. By whom? .....  
..... When? .....

17. X-ray diagnosis .....
- 18.\* Was patient treated by anyone else?.....  
By whom? (name and address).....  
When?.....
19. Was patient hospitalized? Yes. Name and address of hospital: Providence, Anchorage, Aaa.
20. Date of admission to hospital: 9-21-50. Date of discharge: 9-28-50.
21. Is further treatment needed? Yes. For how long? Refer to Dr. Edmunds.

Disability

22. Patient was/will be able to resume regular work on: Unknown.
23. Patient was/will be able to resume light work on: Unknown.
24. If death ensued, give date.....

Give any information of value not included above on back of this sheet.

I am a duly licensed physician in the State of California-Alaska.

Physician's name: H. G. Romig, M.D.

/s/ H. G. ROMIG.

Address: Box 373, Anchorage, Alaska.

Date of this report: 10-2-50.

[Stamped]: Received October 12, 1950, Terr. Dept. of Labor.

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\*18. Referred to Dr. Louis Edmunds, Virginia Mason Hosp., Seattle, Washington, September 28, 1950.

Form AIB No. 104AB.

## First Report—Case Reopened

## Physician's Report of Injury

to the

Territory of Alaska

Alaska Industrial Board

Box 2141 Juneau

This report to be filed forthwith after first attendance. This form may also be used for submitting supplemental information.

## The Patient

1. Name of Injured Person: Mr. Carl Jenkins.
- 1a. Occupation when injured: Electrician. Age: 43. Married or Single: M. Sex: M.
2. Address: Box 1073. City or Town: Anchorage, Aaa.
3. Name of Employer: Chugach Electric Assn. Business: Electric.
4. Address of Employer: Box 488. City or Town: Anchorage, Aaa.
5. Insured by: Name of Company: General Accident.

## The Accident

6. Date of Accident: 9-21-50. Hour: 1:30 p.m. Date disability began: 9-21-50.
7. State in patient's own words where and how accident occurred: Was working on 12,000-volt stuff—came to on the ground.

### The Injury

8. Give accurate description of nature and extent of injury and state your objective findings: See reports from Virginia Mason Clinic—Dr. Edmunds.

9. Will the injury result in (a) Permanent defect? Yes. If so, what?.....

(b) Facial or head disfigurement?.....

10. Is accident above referred to the only cause of patient's condition? Yes. If not, state contributing causes .....

11. Is patient suffering from any disease of the heart, lungs, brain, kidneys, blood, vascular system or any other disabling condition not due to this accident? No. Give particulars.....

Did accident aggravate this condition?.....

12. Has patient any physical impairment due to previous accident or disease? No. Give particulars.....

13. Has normal recovery been delayed for any reason? No. Give particulars.....

### Treatment

14. Date of your first treatment: 3-31-51. Who engaged your services? Company.

15. Describe treatment given by you: Examination—dressings—crutches.

16. Were X-rays taken? Yes. By whom? (name and address): Anchor. Med. & Surg. Clinic. When? 5-24-51.

17. X-ray diagnosis: No osteomyelitis.

18. Was patient treated by anyone else? Yes.  
By whom? (name and address): Dr. Edmunds.  
When?.....

19. Was patient hospitalized?..... Name  
and address of hospital: Not this time.

20. Date of admission to hospital: .....  
Date of discharge: .....

21. Is further treatment needed? Yes. For how  
long? .....

#### Disability

22. Patient was/will be able to resume regular  
work on: Indefinite.

23. Patient was/will be able to resume light  
work on: .....

24. If death ensued, give date: .....

Give any information of value not included  
above on back of this sheet.

I am a duly licensed physician in the State of  
California-Alaska.

Physician's name: H. G. Romig, M.D.

/s/ H.G.R.

Address: Box 373, Anchorage, Aaa.

Date of this report: 6-29-51.

[Stamped]: Received June 10, 1951, Terr. Dept.  
of Labor.

Anchorage Medical and Surgical Clinic  
4th Ave. and L Street  
Box 373  
Anchorage, Alaska

Asa L. Martin, M.D.  
Howard G. Romig, M.D.

July 18, 1952.

Mr. John Shaw,  
Palmer, Alaska.

Re: Carl Jenkins.

Date of Injury: 9-21-50.

Employer: Chugach Electric Assoc.

Dear Sir:

This man was injured 9-21-50 while working for the Chugach Electric Association. As a result he lost his left arm below the shoulder, lost right leg below the knee. His left foot was amputated at the level of the articulation of the toes.

The right leg and left arm with artificial limbs work as well as could be expected. The left foot, however, has failed to heal. Any use of the foot causes breakdowns and slough of the tissues.

On the whole, the circulation of the left foot is better, yet weight bearing causes necrosis and slough.

My plans for treatment would encompass any or possibly all the following procedures: (1) rehospitalization, (2) sympathectomy, (3) reamputation and (or) large thick graft.



I estimate that these procedures would be time-consuming and very expensive, and yet they will be necessary to restore him to some percentage level of occupational ability. As it is, there is little he can do towards making a living. His case has reached a static level as an out-patient. I believe the above-outlined procedure should be instituted soon.

Sincerely,

/s/ H. G. ROMIG.

H. G. Romig, M.D.

HGR/am.

cc: Mr. Jenkins.

[Stamped]: Received August 13, 1952, Alaska Industrial Board.

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[Title of District Court and Cause.]

### AFFIDAVIT OF GEORGE E. HALE

United States of America,  
Territory of Alaska—ss.

George E. Hale, being first duly sworn on oath, deposes and says: I am a duly licensed physician and surgeon and practicing in the Territory of Alaska; I have had 61½ years' experience in orthopedics, including residency; on January 8, 1953, I made a thorough medical examination of Carl E. Jenkins; in my professional opinion, said Jenkins is now permanently totally disabled and became permanently totally disabled on the date of his accident,



which he informed me was on September 21, 1950, and his permanent total disability was confirmed on the respective dates of the amputation of his herein-after-mentioned limbs, which he informed me were: September 30, 1950, left arm amputated 4 inches below shoulder; 10 to 14 days later all toes, except the fifth, were amputated on his left foot, and 10 to 14 days later his right leg was amputated at the mid-thigh level.

/s/ GEORGE E. HALE.

Subscribed and Sworn to before me in Anchorage, Alaska, January 30, 1953.

[Seal] /s/ RAYMOND E. PLUMMER,  
Notary Public for Alaska.

My commission expires 3/30/53.

Received February 2, 1953.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT

United States of America,  
Territory of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that hereunto attached are the following original documents on file in the above-entitled action, viz.:

Doctor H. G. Romig's Physician's Report of Injury to Alaska Industrial Board, dated October 2, 1950;

Doctor H. G. Romig's Physician's Report of Injury to Alaska Industrial Board, dated June 29, 1951;

Doctor H. G. Romig's letter of July 18, 1952, to Attorney John D. Shaw;

Doctor G. E. Hale's affidavit of January 30, 1953, which are herewith certified and returned by me as a Supplemental Transcript at the request of Plaintiffs to the Honorable United States Court of Appeals for the Ninth Circuit for inclusion in the record on appeal herein.

In Witness Whereof I have hereunto set my hand and affixed the seal of the above-entitled Court in Juneau, Alaska, this 16th day of June, 1955.

[Seal]

/s/ J. W. LEIVERS,

Clerk of the District Court.

Copy received June 16, 1955.

/s/ JOHN H. DIMAL,

Attorney for Defendant,

Carl E. Jenkins.

Affidavit of Mail attached.

[Endorsed]: Filed June 16, 1955.

[Endorsed]: No. 14,616. United States Court of Appeals for the Ninth Circuit. Alaska Industrial Board; Composed of Henry A. Benson, Territorial Commissioner of Labor; Neil F. Moore, Territorial Insurance Commissioner, and J. Gerald Williams, Attorney General of Alaska, and Carl E. Jenkins, Appellants, vs. Chugach Electric Association, Inc., a Corporation, and General Accident, Fire & Life Assurance Corporation, Ltd., a Corporation, Appellees. Supplemental Transcript of Record. Appeal From the District Court for the District of Alaska, First Division.

Filed June 18, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 84] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—  
February 14, 1956 (omitted in printing)

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[fol. 85] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge and Stephens, Healy,  
Pope, Lemmon, Fee, Chambers and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER REASSIGNING CAUSE FOR HEARING  
EN BANC—July 23, 1956

By direction of Denman, Chief Judge, and Stephens,  
Pope, Lemmon, Chambers and Hamley, Circuit Judges,

It is ordered that the above case be reheard in banc.

The same shall be submitted, after oral argument, upon  
the briefs filed in the division hearing the appeal together  
with a further brief to be filed by each party within twenty  
days from the making of this order if a party so desires.

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[fol. 86] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy,  
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,  
Circuit Judges.

MINUTE ENTRY OF REARGUMENT AND RESUBMISSION—  
November 20, 1956

Ordered appeal herein reargued by Mr. J. Gerald  
Williams, Attorney General, Territory of Alaska, counsel  
for the Appellants, and by Mr. F. O. Eastaugh, counsel  
for the Appellees, and resubmitted to the Court for con-  
sideration and decision.

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[fol. 87] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy,  
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,  
Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS  
AND FILING AND RECORDING OF JUDGMENT—April 29, 1957

Ordered that the typewritten opinion, and dissenting opinions of Denman, Chief Judge, and Pope, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 88] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 14,616

ALASKA INDUSTRIAL BOARD, and  
CARL E. JENKINS, Appellants,

v.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation and  
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation, Appellees.

Appeal from the District Court for the District of  
Alaska, First Division.

OPINION—April 29, 1957

Before: Denman, Chief Judge, and Stephens, Healy,  
Pope, Lemmon, Fee, Chambers, Barnes, and Hamley,  
Circuit Judges.

HAMLEY, Circuit Judge:

In this case, which arises under the Workmen's Compensation Act of Alaska, two questions are presented on appeal. The first of these is whether, under the circumstances of this case, the Alaska Industrial Board had jurisdiction to reopen a previously-rejected claim for a temporary total disability award. The second is whether, if the board had such jurisdiction, it correctly granted such an award for injuries arising from the same accident

in which a lump-sum award for permanent total disability had previously been granted.

— The following facts, essential to a consideration of these questions, are not in dispute. On September 21, 1950, Carl E. Jenkins received serious injuries when he came into contact with a high voltage electric line while in the course of his employment. His employer was Chugach Electric Association, which had insured its liability under the act with General Accident Fire & Life Assurance Corporation. [fol. 89] As a result of the accident, it was necessary to amputate Jenkins' left arm near the shoulder, his right leg below the knee, and four toes of his left foot. These amputations were made in a series of three surgical operations, the last of which was performed on October 28, 1950. The left foot failed to heal and was still under treatment at the time of his doctor's last report, on December 17, 1953.

Following this injury, his employer and the insurance company began paying Jenkins compensation for temporary total disability, under the "Temporary Disability" provision of Alaska Comp. Laws Ann., § 43-3-1 (1949). This compensation was paid at the rate of \$95.34 per week, for approximately thirty-eight weeks.

On July 25, 1951, the employer and the insurance company reversed their position. They decided that Jenkins had been permanently and totally disabled since October 28, 1950, when the last amputation (the right leg) occurred. Accordingly, they granted him a lump sum of \$8,100, as a permanent total disability award, but deducted from it the \$3,645 which had been paid to Jenkins as temporary total disability. A check in the sum of \$4,455 was sent to Jenkins on July 25, 1951, for the purpose of closing the claim.

On August 14, 1951, Jenkins filed with the board, on its printed form, an application for adjustment of claim. The evident purpose of this application was to claim continuing benefits for temporary disability, despite the allowance of a lump-sum award for permanent total disability.<sup>1</sup>

<sup>1</sup> An amended application was filed on December 10, 1951, correcting the figures originally given for total compensation received.



It was so treated by the employer and insurance company, which filed a joint answer denying that temporary disability continued.

It was also so treated by the chairman of the board, who, on November 12, 1952, filed a decision granting the application. It was held in this decision that temporary disability had continued since October 28, 1950. Jenkins was awarded the \$3,645 which had been deducted from his [fol. 90] lump-sum payment, and continuing temporary disability payments "until a medical end result is reached."

On February 6, 1953, after review by the full membership of the board, the two members other than the chairman filed a decision vacating the chairman's decision and award of November 12, 1952. It was held that, Jenkins' condition having been rated as a total permanent disability on October 28, 1950, "no compensation for total temporary disability is thereafter payable." He was, however, granted a temporary total disability award of \$476.70, **representing compensation for a period of thirty-five days prior to the operation on October 28, 1950.** Jenkins did not seek a district court review of this award, as he might have done under Alaska Comp. Laws Ann., § 43-3-22, (1949).

On May 14, 1953, Jenkins wrote to the chairman of the board, requesting a copy of the decision of February 6, 1953. On November 10, 1953, Jenkins' attorney wrote to the board, requesting that the ~~claim~~ be reopened. On November 21, 1953, Jenkins filed an application for adjustment of claim. He there stated that he was entitled to temporary disability until there was an end to disability through medical means. The employer and the insurance company answered, contending that the decision of February 6, 1953, was res judicata, and that the board was without jurisdiction to reopen the claim.

The board, on January 8, 1954, filed a decision reversing its action of February 6, 1953, holding that a condition of temporary total disability existed on and after October 29, 1950, "no end medical result having been reached." The employer and the insurance company thereupon instituted this action to set aside the board's decision.

In granting judgment for plaintiffs, the district court held that the board was without jurisdiction to reopen



the claim following its decision of February 6, 1953, from which no appeal was taken. Alternatively, it was held that an award for temporary total disability may not be granted for physical disability arising from the same accident in which an award for total permanent disability has been granted.

We will first consider the jurisdictional question which is presented.

[fol. 91] The power and duty of the board with respect to the modification of compensation awards is governed by Alaska Comp. Laws Ann., § 43-3-4 (1949), quoted in the margin.<sup>2</sup>

Appellees contend that Jenkins did not file a claim, within the meaning of the proviso at the end of § 43-3-4,

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<sup>2</sup> Alaska Comp. Laws Ann., § 43-3-4 (1949):

*"Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time.* If an injured employee [is] entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part of subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review [sic] any agreement, award, decision or order, and, on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury."

prior to the expiration of the three-year period specified in that proviso. In this connection, it is pointed out that certain medical reports relied upon by appellants as constituting such a claim were dated prior to the hearing resulting in the decision and award of February 6, 1953. It is further argued that Jenkins' letter of May 14, 1953, does not constitute a claim or seek a rehearing. The letter of November 10, 1953, which his counsel filed with the board, and Jenkins' application for adjustment of claim, filed November 21, 1953, were not filed within three years of the injury, which occurred on September 21, 1950.

[fol. 92] Appellees' argument is apparently based upon the premise that, in order to constitute a "claim" within the meaning of the proviso to § 43-3-4, the document must be filed subsequent to the decision establishing the lower rate of compensation. If this premise is correct, we would agree with appellees that such a claim has not been filed within the statutory three-year period. The letter of May 14, 1953, constituting the only document filed subsequent to the decision and prior to the expiration of the three-year period, was a mere inquiry, and not a claim.

But we find nothing in the statutory language warranting the view that, to constitute a "claim" under this proviso, the document must be filed subsequent to the decision establishing the lower rate of compensation. The "claim" referred to in the proviso is not intended to serve the purpose of an application for rehearing. Under § 43-3-4, no such application need be filed, since the board is expressly authorized to review a prior decision "upon its own motion."

All that the "claim" need contain is a request for an increased rate of compensation over that presently in effect. Jenkins' application of August 14, 1951, amended on December 10, 1951, contained such a request. It was so treated by the employer and insurer in their answer, by the chairman in his decision of November 12, 1952, and by the board in its decision of February 6, 1953. Both the original and amended applications were filed within three years after the injury.

It is of no consequence that the board may actually have reopened the matter in response to Jenkins' insufficient

letter of May 14, 1953, or his tardy claims of November 10 and 21, 1953. Since the board had power to reopen the matter on its own motion, and since it did desire to reopen, the action taken is to be deemed a reopening on the board's own motion.

We hold that Jenkins filed a timely claim for increased compensation, within the meaning of the proviso of § 43-3-4.

Appellees further contend that the board's reviewing power under § 43-3-4 is limited solely to the adjustment of the rate of compensation where there is a change in the physical condition of the claimant within three years of the original injury. Appellees argue, and we agree, that [fol. 93] the temporary total disability award here in question is not for a changed physical condition, but for a physical condition which has existed since the accident.

Appellees' contention that there must have been a change in the physical condition of the claimant since the prior award is supported by a decision of the same trial judge, in *Suryan v. Alaska Industrial Board*, 12 Alaska 571.

We agree that § 43-3-4 provides a method whereby the board may reconsider a previous decision, for the purpose of awarding increased compensation to cover adverse changes in physical condition subsequent to a prior award.<sup>3</sup> We find nothing in § 43-3-4, or elsewhere in the act, however, which limits the power to reopen to cases involving changed physical condition. The words "and it shall afterwards develop" are broad enough to include not only changes in physical condition, but the disclosure of errors of law in connection with the award.<sup>4</sup>

The immediately-following words, "that he or she is or *was* entitled to a higher rate [emphasis added]," add substance to this construction. The word "was" indicates

<sup>3</sup> We so held in *Hilty v. Fairbanks Exploration Co.*, (9 Cir.) 82 F. (2d) 77, and *Keehn v. Alaska Industrial Board*, (9 Cir.) 230 F. (2d) 712.

<sup>4</sup> These words may also be broad enough to include the disclosure of errors of fact. However, in view of § 43-3-22, making a prior award conclusive and binding "as to all questions of fact," unless court proceedings are instituted within thirty days, it is uncertain (and we do not decide) whether the board may reopen a claim for the purpose of reconsidering questions of fact.

that the period during which a claimant may be entitled to increased compensation includes the time between the injury and the earlier award. This negatives the idea that increased compensation must relate to changed physical condition since the prior award.

It is true that, in § 43-3-1 and in the proviso at the end of § 43-3-4, the word "develop" is used to indicate progression of physical disability. But this is because the word is there used in juxtaposition with the words "injury" or "disability." These word combinations do not appear in the body of § 43-3-4, the language being "and it shall afterwards develop."

Appellees next argue that the board's decision of February 6, 1953, is conclusive and binding because no court [fol. 94] proceedings to contest the decision were instituted within thirty days, as provided by § 43-3-22.

Under § 43-3-22, the award is conclusive and binding "as to all questions of fact," unless tested in a court proceeding commenced within thirty days. The award for temporary total disability here in question involves no reconsideration of factual questions. It was known at the time of the prior award that Jenkins' physical condition had not been stabilized. The granting, on reconsideration, of his claim for temporary total disability was not based upon a redetermination of facts, but upon a different view of the meaning of the statute. We need not now decide whether, despite § 43-3-22, the board is authorized, under § 43-3-4, to redetermine questions of fact.

Appellees' final argument on the question of jurisdiction is that § 43-3-29, requiring claims to be filed within two years after the injury, barred the reopening of the claim. But, as before shown, the claim for increased compensation was filed on August 14, 1951, and amended on December 10, 1951, which dates are well within the two-year period. Hence, we need not decide whether the two-year period specified in § 43-3-29 governs in the case of reconsiderations, in view of the three-year limitation specified in the proviso to § 43-3-4.<sup>5</sup>

<sup>5</sup> An additional jurisdictional question has suggested itself to us. Under § 43-3-4, the board is given authority to reopen claims for the purpose of increasing or decreasing the "rate of compensa-

We conclude that the board acted within its jurisdiction and power in reopening this claim for the purpose of further considering Jenkins' request for an award covering temporary total disability.

This brings us to the second principal question presented on this appeal. Where injuries, sufficient in themselves to constitute total and permanent disability, are the basis of the maximum award for such disability, may an allowance [fol. 95] nevertheless be thereafter made for temporary disability based on the failure to heal of an additional injury concurrently sustained?

The pertinent statutory provisions to be examined are the two paragraphs of Alaska Comp. Laws Ann., § 43-3-1 (1949), quoted in the margin.<sup>6</sup>

Appellants' contention that a workman may receive benefit payments for "temporary" disability after he has been awarded a lump-sum payment for total and "permanent"

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tion." It may be that, in a strict sense, the granting of a temporary total disability award to one who has already received a permanent total disability award, is not an increasing of the "rate of compensation" of the original award. This question, however, was not discussed in the briefs or oral argument, and the answer is not so plain as to warrant us in dealing with it *sua sponte*.

<sup>6</sup> The paragraphs of § 43-3-1 in question read:

"[*Temporary disability.*] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

"Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event."

"[*Loss of members as total permanent disability.*] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."



disability resulting from injuries received in the same accident seems to involve a contradiction in terms. Appellants seek to avoid this apparent contradiction by segregating the injuries arising from a single accident. Thus, if, after finding some injuries sufficient to meet the statutory definition of "total and permanent disability," there are enough left over, when separately considered, to meet the statutory definition of "temporary disability," appellants believe the workman is entitled to both awards.

This reasoning might be permissible if we were concerned with permanent and temporary "injuries," as that word is used in the statute, rather than "disabilities," as that word is used in the statute. One may have a permanently injured arm and a temporarily injured leg. But if, by reason of certain injuries, a workman is, under the statute, totally and permanently disabled from doing any work, it follows [fol. 96] that there is, in legislative contemplation, no remaining ability to work which can be affected, either permanently or temporarily, by other injuries received in the same accident.

Appellants argue that the statutory schedule of payments for "total and permanent disability" represents mere arbitrary indemnities, not necessarily associated with loss of earning power. They contend that temporary disability compensation, on the other hand, is directly and solely related to loss of earning power, and thus is compensation for loss of wages during the healing period. Hence, appellants assert, there is no inconsistency in allowing payments for temporary disability after an award has been made for total and permanent disability.

The basic principle of all workmen's compensation laws is that benefits relate to loss of earning capacity and not to physical injury as such. In the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act.<sup>7</sup> The individual receiving such an award may actually be able to continue some work, and hence be, in fact, not totally and permanently disabled. But the fact that some ability to work remains is not

<sup>7</sup> See 2 Larson, *Workmen's Compensation* (1952 ed.) § 58.10.

to be taken into account in determining whether such an individual is entitled to the lump-sum award.

We think it must logically follow that this conclusive presumption cuts both ways. In fixing the compensation for certain injuries, defined in the act as constituting total and permanent disability, sustained in an accident, actual remaining ability to work is to be disregarded for all purposes—those which are favorable to the workman as well as those which are unfavorable. Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits. There is likewise no foundation for an additional partial disability award which, under appellant's theory, would otherwise be available if it became necessary to amputate Jenkins' left foot. The award for total permanent disability resulting from loss of members [fol. 97] is thus intended as a maximum award for disability resulting from injuries received in an accident.

Appellants call attention to the second sentence of the quoted paragraph relating to temporary disability. It is there provided that, in all cases "where the injury develops or proves to be such" as to entitle the employee to compensation under some provision of the schedule "relating to cases other than temporary disability," the amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which the employee shall be entitled under such other or permanent disability schedule. Cases of permanent injury are "cases other than temporary disability," within the meaning of this statute. *Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis* (9 Cir.) 191 F. 2d 262, Cert. Denied, 342 U. S. 913 (1952).<sup>8</sup>

As applied to the facts of this case, the sentence just noted does not authorize the payment of benefits for temporary disability after the workman has been found to have a permanent total disability. It means only that a

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<sup>8</sup> Lathourakis was allowed and paid \$2,005 for temporary disability suffered prior to his condition becoming fixed into permanent disability. He then received a lump-sum award of \$3,600 for fifty per cent permanent disability, and payments for temporary disability thereupon ceased.



lump-sum award for permanent total disability shall be in addition to any benefits theretofore paid or due for temporary disability. If an injury which causes "temporary" disability thereafter develops or proves to be a "total" disability, it is no longer a "temporary" disability.

The district court was therefore correct in holding that, after the disability was determined to be total and permanent, Jenkins was no longer entitled to monthly benefits for temporary disability.

In view of the ruling just stated, we feel constrained to discuss one more aspect of this case. The determination that Jenkins' disability was total and permanent was made by the board in July, 1951. The board, however, attempted to relate back this determination of his status to October 28, 1950, when the second member was amputated. The [fol. 98] board took this action under the mistaken view that any payment for temporary disability was improper. The result was that there was deducted from Jenkins' \$8,100 award for permanent total disability the thirty-eight weekly payments he had received as temporary disability payments since the October date. As before indicated, the total sum so deducted was \$3,645, leaving Jenkins but \$4,455 of his lump-sum award. This action was confirmed by the board's decision of February 6, 1953, except that an award of \$476.70 was made for temporary disability benefits due prior to October 28, 1950.

In our view, the temporary disability payments should not have been deducted from the lump sum to which Jenkins became entitled by virtue of being permanently and totally disabled. We say this notwithstanding the established fact that the loss of members warranting a classification of total and permanent disability unquestionably occurred on October 28, 1950.

Our opinion on this point is governed by the paragraph of § 43-3-1 which relates to temporary disability. It is there provided that when the injury develops or proves to be such as to entitle the employee to compensation under some other provision of the schedule (in this case, the provision relating to total and permanent disability), the

<sup>9</sup> Keehn v. Alaska Industrial Board, note 3, *supra*.

amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which he shall be entitled under such other or permanent disability schedule.

We have heretofore interpreted the words "and it shall afterwards develop", as used in § 43-3-4, to include not only changes in physical condition, but also the disclosure of errors of law in interpreting the statute. Section 43-3-1, now under consideration, uses these same quoted words plus the words "or proves." The added words do not, in our view, affect the meaning to be attributed to this provision. We therefore construe this provision of § 43-3-1 in the same way the similar provision in § 43-3-4 has been construed.

Until July 25, 1951, when the employer and the insurance company reclassified appellant as totally and permanently disabled, he was entitled to receive the temporary benefits which were being paid to him, because he was then classified as temporarily disabled. It follows that, under the para-[fol. 99] graph of § 43-3-1 to which reference has been made, the lump-sum payment awarded on July 25, 1951, should not have been reduced by the sum Jenkins had received, or there was then due him, as a temporary disability award.<sup>10</sup>

There is good reason for this statutory requirement. Benefits for temporary disability are determined as a percentage of average daily wages, and are paid at the time compensation is customarily paid for labor performed at the employer's plant. See § 43-3-1. Such benefits, therefore, are considered as income, and are normally treated

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<sup>10</sup> Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis, *supra*. It was there pointed out that the prior 1929 act did require the amount paid for temporary disability to be deducted from the award under other provisions of the act. This was changed when the present language was enacted in 1946.

The provisions of § 43-3-4 providing for the deduction of amounts already paid, and providing that a new award may be made effective from date of injury, relate to cases wherein a "higher rate of compensation" is awarded. When the employer and the insurance company decided to reclassify appellant as totally and permanently disabled, they were not awarding him a higher rate of compensation.

and expended as such by workmen covered by the act. Lump-sum payments for permanent total disability, on the other hand, are intended to represent capitalization of future earnings.

Hence, if a workman should rely upon the classification of a disability as temporary and treat payments so received as income, the deduction of those payments from his award for permanent disability would leave the injured workman with a sum much less than what the legislature intended as a capitalization of his future earnings.

We accordingly hold that the lump-sum payment of \$8,100 should be in addition to the \$3,645 paid for temporary disability on and after October 28, 1950, and in addition to the \$476.70 award overdue for temporary disability prior to October 28, 1950.

This deduction question was not presented in the trial court, and was not argued in the briefs. It was dealt with to some extent during oral argument. Normally, we would not consider and determine a question not presented in the [fol. 100] trial court and in briefs. This case, however, has been pending for more than five years, thus rendering a remand undesirable. The point under discussion is a matter of public interest in connection with the administration of an important act having wide application. We have therefore considered it appropriate to depart from our usual practice, noted above, so that the case can finally be disposed of on the basis of this opinion.

The judgment is modified in accordance with the views expressed in this opinion, and in all other respects is affirmed.

CHIEF JUDGE DENMAN, dissenting:

I dissent from the majority opinion's harsh and unjust conclusion resulting from its failure to apply to the relationship between the statutory provision for total permanent and total temporary disability, the same liberal rule of interpretation of the Supreme Court and this court,<sup>1</sup> that the majority opinion does in considering the statute's time limitations.

<sup>1</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932); *Libby, McNeill & Libby v. Alaska Industrial Board*, 191 F. 2d 262, 264 (Cir. 9, 1951).

It is obvious and admitted by the majority opinion that an employee's loss of two limbs, here a hand and a foot, does not create his total disability to work. There are many employments for a person with one good hand who can walk with an artificial leg or for one who has two good hands and a wheel chair.

Hence the statement of the statute that such loss "shall constitute total and permanent disability and be compensated according to the provisions of this act with reference to total and permanent disability" can well be construed liberally as providing no more than that one having such an injury shall receive a certain amount of money in any event. Since such a liberal construction would leave to the injured man after the amputation the right to claim compensation for the actual continuing temporary disability from the infections in his left foot, we are required to make it.

[fol. 101] The statute provides for payment from the employer for "all injuries causing temporary disability".<sup>2</sup>

If this provision covers all temporary disabilities from a single industrial accident, the narrow and strict construction of the majority which reads "all" to mean all injuries except those accompanied by a loss of two limbs, etc., distorts the statutory language by depriving the word "all" of its plain meaning in violation of long established principles of statutory construction.<sup>3</sup>

<sup>2</sup> The pertinent portion of Section 43-3-1 reads as follows:

"*Temporary disability.* For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule." [Emphasis added.]

<sup>3</sup> *Rice v. Minn. & N.W.R.R.*, 66 U.S. 358, 379 (1861) ("... it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."); *United States v. Raynor*, 302 U.S. 540, 547 (1938) ("A construction that creates an inconsistency should be avoided when a reasonable inter-

The court's narrow construction leads to a most anomalous result. Under the opinion's rationale, a man like Jenkins who loses two limbs in or shortly after an accident is entitled to total permanent compensation immediately [fol. 102] (\$8,100),<sup>4</sup> but receives nothing thereafter during a long period of hospitalization which may last for several years. On the other hand, a worker who has both legs crushed in an accident (his injury being less serious initially), and is hospitalized for several years while physicians fight to save his legs, gets temporary disability as long as he is in the hospital until a medical end result is reached. This may amount to many thousands of dollars (65% of his weekly pay). If at the end of that time amputation is found necessary, he then receives the total permanent disability lump sum payment in addition. Thus although the end result in each case is the same, the man whose injury was apparently less severe initially gets more compensation. And if the man whose legs were merely crushed did not have to have them eventually amputated, he still could receive more compensation than one in Jenkins' position if his period of temporary disability was long enough.<sup>5</sup>

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pretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress." ); 2 Sutherland, *Statutory Construction* § 4705.

<sup>4</sup> The provision of the Alaska statute for a lump sum award for total permanent disability which is fixed in amount regardless of the injured man's previous wage rate is unique. All other workmen's compensation statutes in this country provide for periodic payments which in all jurisdictions except three vary in amount according to the workman's pay rate prior to his injury. See 2 Larson, *Workmen's Compensation Law*, App. B, Table 8, pp. 524-6 (1952), consisting of a comparison of the total permanent disability provisions of the workmen's compensation laws of 53 jurisdictions. Liberal interpretation of this unique statute requires that we not construe it to deprive the injured man of the temporary compensation which is based on his wage loss and limit him to a mere fixed sum unrelated to his loss of wages in the absence of a clear statutory mandate to that effect.

<sup>5</sup> At the rate of total temporary compensation to which Jenkins was entitled (\$95.34 per week) the temporary compensation would



Nothing in the statute compels this result. In fact the second sentence of the provision of Section 43-3-1 defining temporary disability suggests that permanent and temporary disability payments may both be payable at the same time for one injury, and nothing therein restricts this result to cases where the workman becomes entitled first to temporary disability and thereafter to permanent disability.<sup>6</sup> In my view the argument of the opinion based on the distinction between "injuries" and "disabilities" ignores the realities of the situation and relies on semantics. Such semantical refinements are not sufficient to support the harsh and unreasonable construction of the statute which leads to the conclusion that one who is less severely injured (and suffers less disability) may receive more compensation than one who is more seriously disabled. The words of the Supreme Court in *Baltimore & Phila. [fol. 103] Steamboat Co. v. Norton*, 284 U.S. 408, 413 (1932), appear pertinent:

"It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act."

The temporary disability provisions of the Alaska statute are typical of those of most other jurisdictions in this country. In the absence of a clear statutory mandate to the contrary, the Alaska statute should be construed, as have those of other jurisdictions, as providing temporary

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exceed the total permanent lump sum payment (\$8,100) after only 20 months of total temporary disability. According to the determination of the Board, Jenkins' total temporary disability continued more than three years after his injury.

<sup>6</sup> That sentence reads: "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule."

disability compensation during the healing period until a medical end result is reached.<sup>7</sup>

There is nothing contrary to this in this court's opinion in *Keehn v. Alaska Industrial Board*, 230 F.2d 712 (Cir. 9, 1956). There the physicians had determined that a medical end result had been reached, a 40% permanent disability award had been made and "A" compromise and release signed by the parties." 230 F.2d at 713. Here no such result had been reached and no compromise settlement made, and we are concerned with the initial healing period prior to the occurrence of a medical end result.

It appears to me that the statement of the majority opinion that, "in the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act"<sup>8</sup> which, the opinion asserts, is supported by *Larson*, has no such support as applied to the issue presented in this case. This conclusive presumption is applied, as *Larson's* text shows, to prevent the deduction of any wages actually earned by a worker who is totally and permanently disabled within the meaning of a workmen's [fol. 104] compensation statute from his total permanent disability award.<sup>9</sup> Nothing in the text supports the ma-

<sup>7</sup> See, e.g., *McCall v. Potlatch Forests*, 208 P.2d 799, 801 (Ida. 1949); *Shell Oil Co. v. Industrial Commission*, 119 N.E.2d 224, 230 (Ill. 1954); *Gorman v. Atlantic Gulf & Pacific Co.*, 12 A.2d 525 (Md. 1940); *Laurel Daily Leader v. James*, 80 So.2d 770, 773 (Miss. 1955); *Fallis v. Vogel*, 290 N.W. 461 (Neb. 1940); *Petersen v. Foundation Co.*, 25 A.2d 1 (N.J. 1942); *Peerless Sales Co. v. Industrial Commission*, 154 P.2d 644 (Utah 1944); *Johnson v. Cox*, 82 So.2d 562 (Ala. App. 1955).

<sup>8</sup> Majority opinion, p. 9.

<sup>9</sup> 2 *Larson*, *Workmen's Compensation Law*, § 58.10, p. 42 (1952). See, e.g., *Great American Indemnity Co. v. Segal*, 229 F.2d 845 (Cir. 5, 1956), where the court, in affirming a total disability award and disallowing a deduction for wages earned by the disabled worker, quoted a Texas decision as follows:

"[T]otal incapacity does not mean utter inability to do any work at all, but that a man's disability is total, within [the meaning of the statute], when he can no longer 'secure and hold employment for physical labor' such as he had to do to make a living prior to his injury."

229 F.2d at 846.



majority's statement that "this conclusive presumption cuts both ways" and therefore that it must be applied to reduce the injured workman's compensation.<sup>10</sup> So applied, the presumption defeats the purpose which it was created to serve (i.e., to maximize the recovery of the injured man), and as applied to the present facts, results in a construction of the statute which violates the principle of the *Norton* case, *supra*.

It is significant that under other workmen's compensation statutes which closely resemble the Alaska statute in their provisions for the determination of permanent and temporary disability, a large number of cases have held that where "the effects of the loss of a member extend to other parts of the body . . . the schedule allowance for the lost member is not exclusive."<sup>11</sup> These cases are but another illustration of the liberal rule of construction in workmen's compensation cases.<sup>12</sup> Since temporary disability compensation covers the healing period,<sup>13</sup> it appears to me that a fortiori the same rule of construction requires us to hold that where the failure of an amputation to heal [fol 105] has inflicted upon the workman a temporary disability in fact far greater than the loss of the limb itself he is entitled to total temporary disability compensation until the healing of the amputation is completed.

Instead of the liberal treatment to which this unfortunate man and his family are entitled the majority is leaving him unpaid for the long period of *actual* total disability admittedly arising from the electric burning in his employer's service, and a most harmful rule of construction is established for this circuit.

<sup>10</sup> Majority opinion, p. 9.

<sup>11</sup> *Larson*, op. cit. *supra* note 9, § 58.20 p. 44, cases cited note 38.

<sup>12</sup> *Larson*, op. cit. *supra* note 11, p. 45. The text writer suggests that "destruction of the most favorable remedy should not be read into the act by implication." *Ibid*. In contrast to other workmen's compensation statutes, the provision of the Alaska Act for temporary disability compensation is more adequate than its permanent disability compensation provisions (note 4 *supra*). Hence the above quoted principle here strongly supports affirmance of the Board's decision.

<sup>13</sup> Note 7, *supra*.

POPE, Circuit Judge, dissenting:

What Judge Denman has pointed out in his footnote, 4, namely, that the lump sum payment under the Alaska statute is in no way related to the wage scale of the injured workman, has convinced me that it is not proper to apply here what the majority opinion calls a "basic principle of all workmen's compensation", that is, that "benefits relate to loss of earning capacity and not to physical injury as such." My difficulty is in seeing how we can read a "basic principle" into a statute like this one which bears evidence of having been drawn on a very different theory.

The majority opinion says: "One may have a permanently injured arm and a temporarily injured leg." Just as self-evident is the proposition that one may have a permanently injured arm and leg and a temporarily injured leg, or he may lose an arm and a leg and have a temporarily injured leg. That is this case.

The opinion further says: "The individual receiving such an award [i.e., for loss of an arm and a leg] may actually be able to continue to do some work." I have not been able to find in the statute anything which says that if that ability to continue to do some work is temporarily impaired by injury of the remaining leg, he shall receive no compensation for that distinct temporary disability.

The majority opinion appears to get away from that by asserting the existence of a conclusive presumption that "cuts both ways". According to the opinion it "cuts both ways" so that although the person receiving the lump sum award may "actually be able to continue some work" yet he [fol. 106] is conclusively presumed not to be able to do what he is "actually" able to do. The opinion arrives at this conclusive presumption that "cuts both ways" by extending the presumption discussed by Larson (see footnote 7) in a manner for which the cases cited by Larson furnish no authority. Those cases indulge the conclusive presumption for the *protection* of the workman and to prevent him from losing his total permanent disability award. I think the Alaska statute does not warrant ere-

ating a presumption that cuts the other way and minimizes the compensation which the workman might otherwise claim.

It is a universally accepted rule relating to workmen's compensation laws that they should be liberally construed in favor of the injured workman. When I know it is a fact, as the majority opinion concedes, that a workman who has lost an arm and a leg may actually be able to continue some work and that such work may for the time being be prevented by what the opinion calls a "temporarily injured leg", I cannot be persuaded that I should create a new double-edged presumption that what I thus know to be possible is as a matter of law impossible.

I am persuaded that if we would not import into this unique statute any "basic principle" or "conclusive presumption" not actually found in the act itself, and would just take this statute by its four corners and apply the usual liberal construction in favor of the injured workman, we would have to find that it provides that the fixed award for certain specified injuries was not intended to bar further compensation for the temporary loss of such earning power as remained after the injury.

With Judge Denman I think the judgment should be reversed.

[File endorsement omitted]

[fol. 107] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 14616

ALASKA INDUSTRIAL BOARD, and  
CARL E. JENKINS, Appellants,

v.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation and  
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation, Appellees.

JUDGMENT—Filed and Entered April 29, 1957

Appeal from the District Court for the District of  
Alaska, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, First Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court be, and hereby is modified in accordance with the views expressed in the opinion of this court, and in all other respects the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellants and against the Appellees.

It Is Further Ordered and adjudged by this Court that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

[File endorsement omitted]

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Denman, Chief Judge, and Stephens, Healy, Pope, Lommon, Fee, Chambers, Barnes, and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION  
FOR REHEARING—June 7, 1957

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed May 28, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

[fol. 110] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 111] IN SUPREME COURT OF THE UNITED STATES

No. 303, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U.S.

FILED

JUL 22 1957

JOHN T. FEY, Clerk

# In the Supreme Court

• OF THE

**United States**

OCTOBER TERM, 1957

**No. 303**

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Petitioners,*

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI  
to the United States Court of Appeals  
for the Ninth Circuit.**

**J. GERALD WILLIAMS,**

Attorney General of Alaska,

Juneau, Alaska,

*Counsel for Petitioner Alaska*

*Industrial Board.*

**JOHN H. DIMOND,**

P. O. Box 1121,

Juneau, Alaska,

*Counsel for Petitioner*

*Carl E. Jenkins.*

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# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1957

No.

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Petitioners,*

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI**

**to the United States Court of Appeals  
for the Ninth Circuit.**

Petitioners pray that a writ of certiorari issue to re-  
view the judgment of the United States Court of Ap-  
peals for the Ninth Circuit, entered in the above en-  
titled case on April 29, 1957.

### OPINION BELOW.

The opinion of the District Court is found in the printed transcript of record used in the Court below, at pp. 56-62, and is reported at 122 F. Supp. 210. The opinion of the Court of Appeals (R. 88-106), as yet unreported, is printed in the Appendix hereto, *infra*, at pp. 1-27.

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### JURISDICTION.

The judgment of the Court of Appeals, dated April 29, 1957, was entered on that date (R. 107), and is printed in the Appendix, *infra*, pp. 28-29. Appellees filed their petition for a rehearing, but this was denied on June 7, 1957 (R. 109). The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254 (1).

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### QUESTION PRESENTED.

In an industrial accident a workman lost his left arm, his right leg and four toes of his left foot. By reason of the loss of the arm and leg, the workman became entitled to a scheduled lump-sum award of compensation for "total permanent disability." His left foot, however, was slow in healing, and this resulted in the workman being totally (but only temporarily) disabled from earning a living, for a limited period of time.

During the period of healing of the left foot, and after having received the award for the loss of an arm and leg, was this workman entitled to compensation for total temporary disability?

### STATUTES INVOLVED.

This case involves the interpretation of certain provisions of the Alaska Workmen's Compensation Act, the relevant portions of which are printed in the Appendix, *infra*, pp. 30-37.

### STATEMENT.

The facts, essential to a consideration of the question presented here, are as follows:

1. On September 21, 1950, while in the course of his employment with Chugach Electric Association, Carl E. Jenkins came into contact with a high voltage electric line and received serious injuries. This resulted in a series of three surgical operations, i.e., the amputations of Jenkins' left arm near the shoulder, the right leg below the knee, and four toes of his left foot. (R. 13-14, 15-16, 18-20, 41-42, 56). The last amputation (the right leg) took place on October 28, 1950 (R. 46).
2. The left foot failed to heal (R. 12-16, 18, 22-27), and was still under treatment at the time of the doctor's last report of December 17, 1953 (R. 26-27). Because of this, Jenkins had been unable to secure gainful employment (R. 19, 27, 42), and was thus in a state of continuing disability—temporary in duration, but while it lasted, total in scope.
3. Following the injury, respondents paid Jenkins compensation for temporary total disability under the "Temporary Disability" provision of the Alaska Workmen's Compensation Act, Sec. 43-3-1, Alaska

Compiled Laws Annotated 1949. This was paid at the rate of \$95.34 a week for approximately 38 weeks—a total of \$3,645.00 (R. 36, 42).

4. On July 25, 1951, respondents reversed their position. They decided that Jenkins had been totally and permanently disabled since October 28, 1950, when the last amputation took place. They recognized that he was entitled to \$8,100.00, as the scheduled lump-sum award for the loss of an arm and a leg,<sup>1</sup> but deducted from it the sum of \$3,645.00 previously paid as temporary total disability. Hence, respondents sent to Jenkins on July 25, 1951, their check for \$4,455.00—for the purpose of closing the claim (R. 44).

5. Jenkins then applied to the petitioner, Alaska Industrial Board, for continuing benefits for temporary disability, despite the allowance of the lump-sum award for permanent total disability (R. 39-40). This application was granted by the chairman of the Board on November 12, 1952, on the ground that temporary total disability had continued since October 28, 1950. He awarded Jenkins \$3,645.00, which respondents had deducted from the \$8,100.00 lump-sum payment, and in addition awarded further compensation for total temporary disability caused by the failure of the left foot to heal and "until a medical end result is reached." (R. 41-45.)

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<sup>1</sup>Sec. 43-3-1, ACLA 1949. "[Loss of members as total permanent disability.] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."

6. On February 6, 1953, after a review by the full membership of the Board, the chairman's decision and award was vacated and set aside by the other two members. Here it was held that since Jenkins had suffered a "total permanent" disability on October 28, 1950, when the final amputation took place, no compensation for "total temporary" disability was thereafter payable (R. 46-47). However, Jenkins was allowed \$476.70 as total temporary disability compensation for a period of 35 days prior to the operation of October 28, 1950 (R. 47).

7. Later the matter was considered again, and on January 8, 1954, the Board reversed its prior action of February 6, 1953. This time the Board held that a condition of total temporary disability had existed on and after October 28, 1950, and that it still continued since no "medical end result" had been reached (R. 52). This meant that Jenkins was entitled to temporary disability compensation at the rate of \$95.34 a week from October 28, 1950 and until his left foot had either healed or had been restored physically as far as possible by medical means.

8. Thereafter, respondents instituted this action in the District Court to set aside the Board's decision (R. 28). On July 27, 1954, that Court filed its written opinion reversing the Board's action and holding that an award for temporary total disability could not be granted for physical disability arising from the same accident in which a scheduled, lump-sum award for "total permanent disability" had been granted (R. 56-60). Judgment was entered for respondents on



July 30, 1954 (R. 61-62). Petitioners applied for rehearing (R. 62-63), but this was denied by the District Court on October 7, 1954 (R. 64).

9. An appeal was taken by petitioners (R. 63), and the matter was argued twice: once, before the regular 3-judge division of the Court of Appeals (R. 84), and then later, before the Court below sitting in banc (R. 85-86). On April 29, 1957, the Court below upheld the ruling of the District Court. It was held that after a workman had lost an arm and a leg and had thus suffered injuries severe enough to entitle him to a scheduled award for "total permanent disability," he could not thereafter be awarded weekly benefits for "total temporary disability"—despite the fact that other and separate injuries, suffered in the same accident, were slow in healing and thus prevented the workman from becoming gainfully employed for a limited period of time.

10. Chief Judge Denman and Judge Pope dissented. It was their opinion that a liberal construction of the Alaska Workmen's Compensation Act required a holding that Jenkins was entitled to temporary disability compensation during the period of healing of his left foot, despite the fact that he had received a fixed, lump-sum award just by reason of having had two amputations of other members of his body. They felt that the majority had interpreted the Alaska Act harshly and unreasonably, and had established a most harmful rule of construction for the circuit. They, therefore, urged that the judgment of the District Court be reversed.

## REASONS FOR GRANTING THE WRIT.

1. It has been firmly established that workmen's compensation statutes, in order to effect their humanitarian purposes, should be liberally construed in favor of the injured workman.<sup>2</sup> As recently as last year this Court again recognized and made practical application of this rule in its construction of the Longshoremen's and Harbor Workers' Act. In *Czaplicki v. S.S. Silver Cloud*, 351 US 525, 100 L ed 1387 (1956) it was held that the statute should be construed so as to allow Czaplicki to enforce, in his own name, the rights of action that were his originally. Recognizing the existence of contrary holdings, this Court nevertheless said (p. 531):

"We think, however, that allowing suit by the employee in these circumstances is the *proper way to ensure him the rights given by the Compensation Act.*" (Emphasis added.)

But despite this universally accepted and continually repeated proposition, narrow and unjust constructions are frequently being urged.<sup>3</sup> A striking example is the inescapable result of the majority opinion in the instant case: that under the Alaska Act a workman who is less severely injured and suffers less actual disability, can receive more compensation than one who is more seriously disabled.<sup>4</sup> When the statute is logi-

<sup>2</sup>*Baltimore & Philadelphia S. S. Co. v. Norton*, 284 US 408, 414, 76 L ed 366, 370 (1932); *Voris v. Eikel*, 346 US 328, 333, 98 L ed 5, 10 (1953); *Pillsbury v. United Engineering Co.*, 342 US 197, 200, 96 L ed 225, 229 (1952).

<sup>3</sup>NACCA Law Journal—Vol. 15, pp. 157-158.

<sup>4</sup>See dissenting opinion of Chief Judge Denman (R. 102).

cally and readily susceptible of an interpretation that will avoid this harsh result,<sup>5</sup> then the injustice of the decision of the Court below and its departure from this Court's oft repeated rule of liberal construction is so clear as to call for this Court's power of supervision and review.

The Court of Appeals for the First Circuit has stated that under the Longshoremen's and Harbor Workers' Act there is no actual inconsistency between a man being totally disabled *for the purpose of the Act*, and possessing a present ability to do work of a limited nature.<sup>6</sup> Neither, then, should there be any actual inconsistency between a man being totally and permanently disabled for the purposes of the Alaska Act, and at the same time not having a present ability to do work of even a limited nature by reason of a *temporary* disability caused by the failure of an injured member of his body to heal—this injury having had nothing to do with the awarding of compensation for total and permanent disability.

The Alaska Act encompasses, with few exceptions, every person who employs one or more employees in

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<sup>5</sup>See succinct statement of Judge Pope in his dissenting opinion (R. 106):

"I am persuaded that if we would not import into this unique statute any 'basic principle' or 'conclusive presumption' not actually found in the act itself, and would just take this statute by its four corners and apply the usual liberal construction in favor of the injured workman, we would have to find that it provides that the fixed award for certain specified injuries was not intended to bar further compensation for the temporary loss of such earning power as remained after the injury."

<sup>6</sup>*Eastern S. S. Lines v. Monahan*, CA-1, 1940, 110 F.2d 840, 841.

connection with any business, occupation, work, employment, or industry carried on in the Territory.<sup>7</sup> And if any such employee is injured while earning his livelihood, his sole remedy is under the Act; his right to compensation under the statute being exclusive of all rights and remedies at common law or otherwise.<sup>8</sup>

Certainly, then, the question decided by the Court below is one of real importance to the Territory of Alaska and its citizens. A rule of construction has been established which is far reaching in its consequences, for the lives and livelihood of not merely a few, but of many, persons in Alaska will be affected.

And this decision is of more than local concern. Because of the relatively small labor force in Alaska and the seasonal nature of employment there, there is a great migratory movement of workers from the Pacific Coast States to Alaska each year for the Summer's activities.<sup>9</sup> With respect to the fishing industry, this Court has noted that fact in the *Aragon* case<sup>10</sup>; and the Court below, in another case involving the Alaska Workmen's Compensation Act, made reference to this interstate movement of workers:<sup>11</sup>

"This is one of the many industrial accident cases arising in Alaska, an area in which the difference between Summer and Winter climate causes a

<sup>7</sup>Sec. 43-3-1, ACLA 1949, as amended. See Appendix, *infra*, p. 30.

<sup>8</sup>Sec. 43-3-10, ACLA 1949. See Appendix, *infra* p. 36.

<sup>9</sup>See Denison, "Alaska Today", pp. 167-169.

<sup>10</sup>*Unemp. Comp. Comm. v. Aragon*, 329 US 143, 146, 91 L ed 136, 141.

<sup>11</sup>*Brown v. Alaska Industrial Board, et al.*, CA-9, 1955, 224 F.2d 680, 681.

large number of employees to engage in two different employments in the course of a year. Many are employed in Alaska in the seasonal employment there and at other times in the States."

This is also pointed out in the statistics of the Alaska Employment Security Commission. The Commission's annual report to the Governor of Alaska for the fiscal year ending June 30, 1956, shows that total unemployment benefit payments were \$5,105,948.00, and that of this amount the sum of \$1,090,321.00 represented payments to claimants residing in the States.<sup>12</sup>

This demonstrates that interpretations of the Alaska Workmen's Compensation Act have import not only in respect to Alaska residents, but also in respect to the citizens of the several States. The decision of the Court below, it is submitted, is clearly in conflict with the meaning and spirit of the statute, and because of its real significance and effect upon many persons, there is substantial reason to justify a review by this Court.

2. The question presented here is neither simple of solution nor unimportant. The Alaska Industrial Board had difficulties; for it first construed the statute against Jenkins' contentions,<sup>13</sup> and then later it reversed its position and held just the opposite.<sup>14</sup> The District Court referred to the absence of authority on this point.<sup>15</sup> When the matter was presented to the

<sup>12</sup>See Appendix, *infra*, p. 38.

<sup>13</sup>R. 46-47.

<sup>14</sup>R. 52.

<sup>15</sup>*Chugach Electric Assn., et al. v. Alaska Industrial Board, et al.*, 122 F. Supp. 210, 211 (R. 57).



Court below it was argued twice: once, before the regular three-judge division of the Court on February 14, 1956,<sup>16</sup> and a second time, on November 20, 1956, before all nine judges of the Court of Appeals sitting in banc.<sup>17</sup>

All of the States and Territories have workmen's compensation statutes that provide payments for total and permanent disability,<sup>18</sup> and they also have temporary disability provisions of which, as Judge Denman has pointed out, the Alaska provisions are typical.<sup>19</sup>

In a somewhat similar case decided by the Court below in 1956, the question was whether under the Alaska Act further temporary disability compensation could be allowed while the applicant was receiving compensation for a partial permanent disability or had received a lump sum by award or approved settlement therefor. The Court recognized that this presented

"... a *serious question*, and one on which we have been able to find little authority."<sup>20</sup> (Emphasis added.)

Larson testifies to the fact that the extent to which schedule allowances should be deemed exclusive is a "most important question of general applicability" in

<sup>16</sup>R. 84.

<sup>17</sup>R. 86.

<sup>18</sup>*Larson's Workmen's Compensation Law* (1952), Vol. 2, Appendix B, Table 8, pp. 524-526.

<sup>19</sup>R. 103.

<sup>20</sup>*Keehn v. Alaska Industrial Board*, CA-9, 1956, 230 F.2d 712, 715 (footnote 1).



this area.<sup>21</sup> And in the majority opinion of the Court below it was stated that this was

“... a matter of *public interest* in connection with the administration of an act having *wide application*.” (emphasis added.)<sup>22</sup>

The Court below has established a precedent of wide application in the important field of workmen's compensation. Therefore, the question for decision is one of considerable public interest and importance, and ought to be reviewed by this Court.

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### CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, Juneau, Alaska,  
July 17, 1957.

J. GERALD WILLIAMS,  
Attorney General of Alaska,  
*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,  
*Counsel for Petitioner  
Carl E. Jenkins.*

(Appendix Follows.)

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<sup>21</sup>Larson's *Workmen's Compensation Law*, Vol. 2, Sec. 58.20, p. 44.

<sup>22</sup>R. 100. See Appendix, *infra*, p. 18.

**Appendix**

*United States Court of Appeals  
for the Ninth Circuit*

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Appellants,*

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Appellees.*

No. 14,616

Apr. 29, 1957

Appeal from the District Court for the  
District of Alaska, First Division.

Before: Denman, Chief Judge, and Stephens, Healy,  
Pope, Lemmon, Fee, Chambers, Barnes, and  
Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

In this case, which arises under the Workmen's Compensation Act of Alaska, two questions are presented on appeal. The first of these is whether, under the circumstances of this case, the Alaska Industrial Board had jurisdiction to reopen a previously-rejected claim for a temporary total disability award.

The second is whether, if the board had such jurisdiction, it correctly granted such an award for injuries arising from the same accident in which a lump-sum award for permanent total disability had previously been granted.

The following facts, essential to a consideration of these questions, are not in dispute. On September 21, 1950, Carl E. Jenkins received serious injuries when he came into contact with a high voltage electric line while in the course of his employment. His employer was Chugach Electric Association, which had insured its liability under the act with General Accident Fire & Life Assurance Corporation.

As a result of the accident, it was necessary to amputate Jenkins' left arm near the shoulder, his right leg below the knee, and four toes of his left foot. These amputations were made in a series of three surgical operations, the last of which was performed on October 28, 1950. The left foot failed to heal and was still under treatment at the time of his doctor's last report, on December 17, 1953.

Following this injury, his employer and the insurance company began paying Jenkins compensation for temporary total disability, under the "Temporary Disability" provision of Alaska Comp. Laws Ann., § 43-3-1. (1949). This compensation was paid at the rate of \$95.34 per week, for approximately thirty-eight weeks.

On July 25, 1951, the employer and the insurance company reversed their position. They decided that

Jenkins had been permanently and totally disabled since October 28, 1950, when the last amputation (the right leg) occurred. Accordingly, they granted him a lump sum of \$8,100, as a permanent total disability award, but deducted from it the \$3,645 which had been paid to Jenkins as temporary total disability. A check in the sum of \$4,455 was sent to Jenkins on July 25, 1951, for the purpose of closing the claim.

On August 14, 1951, Jenkins filed with the board, on its printed form, an application for adjustment of claim. The evident purpose of this application was to claim continuing benefits for temporary disability, despite the allowance of a lump-sum award for permanent total disability.<sup>1</sup> It was so treated by the employer and insurance company, which filed a joint answer denying that temporary disability continued.

It was also so treated by the chairman of the board, who, on November 12, 1952, filed a decision granting the application. It was held in this decision that temporary disability had continued since October 28, 1950. Jenkins was awarded the \$3,645 which had been deducted from his lump-sum payment, and continuing temporary disability payments "until a medical end result is reached."

On February 6, 1953, after review by the full membership of the board, the two members other than the chairman filed a decision vacating the chairman's de-

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<sup>1</sup>An amended application was filed on December 10, 1951, concerning the figures originally given for total compensation received.

cision and award of November 12, 1952. It was held that, Jenkins' condition having been rated as a total permanent disability on October 28, 1950, "no compensation for total temporary disability is thereafter payable." He was, however, granted a temporary total disability award of \$476.70, representing compensation for a period of thirty-five days prior to the operation on October 28, 1950. Jenkins did not seek a district court review of this award, as he might have done under Alaska Comp. Laws Ann., § 43-3-22, (1949).

On May 14, 1953, Jenkins wrote to the chairman of the board, requesting a copy of the decision of February 6, 1953. On November 10, 1953, Jenkins' attorney wrote to the board, requesting that the claim be reopened. On November 21, 1953, Jenkins filed an application for adjustment of claim. He there stated that he was entitled to temporary disability until there was an end to disability through medical means. The employer and the insurance company answered, contending that the decision of February 6, 1953, was res judicata, and that the board was without jurisdiction to reopen the claim.

The board, on January 8, 1954, filed a decision reversing its action of February 6, 1953, holding that a condition of temporary total disability existed on and after October 29, 1950, "no end medical result having been reached." The employer and the insurance company thereupon instituted this action to set aside the board's decision.

In granting judgment for plaintiffs, the district court held that the board was without jurisdiction to reopen the claim following its decision of February 6, 1953, from which no appeal was taken. Alternatively, it was held that an award for temporary total disability may not be granted for physical disability arising from the same accident in which an award for total permanent disability has been granted.

We will first consider the jurisdictional question which is presented.

The power and duty of the board with respect to the modification of compensation awards is governed by Alaska Comp. Laws Ann., § 43-3-4 (1949), quoted in the margin.<sup>2</sup>

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<sup>2</sup>Alaska Comp. Laws Ann., § 43-3-4 (1949):

*"Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee [is] entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part of subdivision of this schedule, then and in that event he or she shall receive higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review [sic] any agreement, award, decision or order, and, on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensa-*



Appellees contend that Jenkins did not file a claim, within the meaning of the proviso at the end of § 43-3-4, prior to the expiration of the three-year period specified in that proviso. In this connection, it is pointed out that certain medical reports relied upon by appellants as constituting such a claim were dated prior to the hearing resulting in the decision and award of February 6, 1953. It is further argued that Jenkins' letter of May 14, 1953, does not constitute a claim or seek a rehearing. The letter of November 10, 1953, which his counsel filed with the board, and Jenkins' application for adjustment of claim, filed November 21, 1953, were not filed within three years of the injury, which occurred on September 21, 1950.

Appellees' argument is apparently based upon the premise that, in order to constitute a "claim" within the meaning of the proviso to § 43-3-4, the document must be filed subsequent to the decision establishing the lower rate of compensation. If this premise is correct, we would agree with appellees that such a claim has not been filed within the statutory three-year period. The letter of May 14, 1953, constituting the only document filed subsequent to the decision and

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tion due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury."

prior to the expiration of the three-year period, was a mere inquiry, and not a claim.

But we find nothing in ~~the~~ statutory language warranting the view that, to constitute a "claim" under this proviso, the document must be filed subsequent to the decision establishing the lower rate of compensation. The "claim" referred to in the proviso is not intended to serve the purpose of an application for rehearing. Under § 43-3-4, no such application need be filed, since the board is expressly authorized to review a prior decision "upon its own motion."

All that the "claim" need contain is a request for an increased rate of compensation over that presently in effect. Jenkins' application of August 14, 1951, amended on December 10, 1951, contained such a request. It was so treated by the employer and insurer in their answer, by the chairman in his decision of November 12, 1952, and by the board in its decision of February 6, 1953. Both the original and amended applications were filed within three years after the injury.

It is of no consequence that the board may actually have re-opened the matter in response to Jenkins' insufficient letter of May 14, 1953, or his tardy claims of November 10 and 21, 1953. Since the board had power to reopen the matter on its own motion, and since it did desire to reopen, the action taken is to be deemed a reopening on the board's own motion.

We hold that Jenkins filed a timely claim for increased compensation, within the meaning of the proviso of § 43-3-4.

Appellees further contend that the board's reviewing power under § 43-3-4 is limited solely to the adjustment of the rate of compensation where there is a change in the physical condition of the claimant within three years of the original injury. Appellees argue, and we agree, that the temporary total disability award here in question is not for a changed physical condition, but for a physical condition which has existed since the accident.

Appellees' contention that there must have been a change in the physical condition of the claimant since the prior award is supported by a decision of the same trial judge, in *Suryan v. Alaska Industrial Board*, 12 Alaska 571.

We agree that § 43-3-4 provides a method whereby the board may reconsider a previous decision, for the purpose of awarding increased compensation to cover adverse changes in physical condition subsequent to a prior award.<sup>3</sup> We find nothing in § 43-3-4, or elsewhere in the act, however, which limits the power to reopen to cases involving changed physical condition. The words "and it shall afterwards develop" are broad enough to include not only changes in physical condition, but the disclosure of errors of law in connection with the award.<sup>4</sup>

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<sup>3</sup>We so held in *Hilty v. Fairbanks Exploration Co.*, (9 Cir.) 82 F. (2d) 77, and *Keehn v. Alaska Industrial Board*, (9 Cir.) 230 F. (2d) 712.

<sup>4</sup>These words may also be broad enough to include the disclosure of errors of fact. However, in view of § 43-3-22, making a prior award conclusive and binding "as to all questions of fact," unless

The immediately-following words, "that he or she is or *was* entitled to a higher rate [emphasis added]," add substance to this construction. The word "was" indicates that the period during which a claimant may be entitled to increased compensation includes the time between the injury and the earlier award. This negatives the idea that increased compensation must relate to changed physical condition since the prior award.

It is true that, in § 43-3-1 and in the proviso at the end of § 43-3-4, the word "develop" is used to indicate progression of physical disability. But this is because the word is there used in juxtaposition with the words "injury" or "disability." These word combinations do not appear in the body of § 43-3-4, the language being "and it shall afterwards develop."

Appellees next argue that the board's decision of February 6, 1953, is conclusive and binding because no court proceedings to contest the decision were instituted within thirty days, as provided by § 43-3-22.

Under § 43-3-22, the award is conclusive and binding "as to all questions of fact," unless tested in a court proceeding commenced within thirty days. The award for temporary total disability here in question involves no reconsideration of factual questions. It was known at the time of the prior award that Jenkins' physical condition had not been stabilized. The granting, on reconsideration, of his claim for tempo-

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court proceedings are instituted within thirty days, it is uncertain (and we do not decide) whether the board may reopen a claim for the purpose of reconsidering questions of fact.

rary total disability was not based upon a redetermination of facts, but upon a different view of the meaning of the statute. We need not now decide whether, despite § 43-3-22, the board is authorized, under § 43-3-4, to redetermine questions of fact.

Appellees' final argument on the question of jurisdiction is that § 43-3-29, requiring claims to be filed within two years after the injury, barred the reopening of the claim. But, as before shown, the claim for increased compensation was filed on August 14, 1951, and amended on December 10, 1951, which dates are well within the two-year period. Hence, we need not decide whether the two-year period specified in § 43-3-29 governs in the case of reconsiderations, in view of the three-year limitation specified in the proviso to § 43-3-4.<sup>5</sup>

We conclude that the board acted within its jurisdiction and power in reopening this claim for the purpose of further considering Jenkins' request for an award covering temporary total disability.

This brings us to the second principal question presented on this appeal. Where injuries, sufficient in themselves to constitute total and permanent disability

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<sup>5</sup>An additional jurisdictional question has suggested itself to us. Under § 43-3-4, the board is given authority to reopen claims for the purpose of increasing or decreasing the "rate of compensation." It may be that, in a strict sense, the granting of a temporary total disability award to one who has already received a permanent total disability award, is not an increasing of the "rate of compensation" of the original award. This question, however, was not discussed in the briefs or oral argument, and the answer is not so plain as to warrant us in dealing with it sua sponte.



ity, are the basis of the maximum award for such disability, may an allowance nevertheless be thereafter made for temporary disability based on the failure to heal of an additional injury concurrently sustained?

The pertinent statutory provisions to be examined are the two paragraphs of Alaska Comp. Laws Ann., § 43-3-1 (1949), quoted in the margin.<sup>6</sup>

Appellants' contention that a workman may receive benefit payments for "temporary" disability after he has been awarded a lump-sum payment for total and "permanent" disability resulting from injuries received in the same accident seems to involve a contradiction in terms. Appellants seek to avoid this apparent contradiction by segregating the injuries aris-

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<sup>6</sup>The paragraphs of § 43-3-1 in question read:

"[*Temporary disability.*] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

"Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event."

"[*Loss of members as total permanent disability.*] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."



ing from a single accident. Thus, if, after finding some injuries sufficient to meet the statutory definition of "total and permanent disability," there are enough left over, when separately considered, to meet the statutory definition of "temporary disability," appellants believe the workman is entitled to both awards.

This reasoning might be permissible if we were concerned with permanent and temporary "injuries," as that word is used in the statute, rather than "disabilities," as that word is used in the statute. One may have a permanently injured arm and a temporarily injured leg. But if, by reason of certain injuries, a workman is, under the statute, totally and permanently disabled from doing any work, it follows that there is, in legislative contemplation, no remaining ability to work which can be affected, either permanently or temporarily, by other injuries received in the same accident.

Appellants argue that the statutory schedule of payments for "total and permanent disability" represents mere arbitrary indemnities, not necessarily associated with loss of earning power. They contend that temporary disability compensation, on the other hand, is directly and solely related to loss of earning power, and thus is compensation for loss of wages during the healing period. Hence, appellants assert, there is no inconsistency in allowing payments for temporary disability after an award has been made for total and permanent disability.

The basic principle of all workmen's compensation laws is that benefits relate to loss of earning capacity

and not to physical injury as such. In the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act.<sup>7</sup> The individual receiving such an award may actually be able to continue some work, and hence be, in fact, not totally and permanently disabled. But the fact that some ability to work remains is not to be taken into account in determining whether such an individual is entitled to the lump-sum award.

We think it must logically follow that this conclusive presumption cuts both ways. In fixing the compensation for certain injuries, defined in the act as constituting total and permanent disability, sustained in an accident, actual remaining ability to work is to be disregarded for all purposes—those which are favorable to the workman as well as those which are unfavorable. Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits. There is likewise no foundation for an additional partial disability award which, under appellant's theory, would otherwise be available if it became necessary to amputate Jenkins' left foot. The award for total permanent disability resulting from loss of members is thus intended as a maximum award for disability resulting from injuries received in an accident.

Appellants call attention to the second sentence of the quoted paragraph relating to temporary disability.

<sup>7</sup>See 2 Larson, Workmen's Compensation (1952 ed.) § 58.10.

It is there provided that, in all cases "where the injury develops or proves to be such" as to entitle the employee to compensation under some provision of the schedule "relating to cases other than temporary disability," the amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which the employee shall be entitled under such other or permanent disability schedule. Cases of permanent injury are "cases other than temporary disability," within the meaning of this statute. *Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis* (9 Cir.) 191 F. 2d 262, Cert. Denied, 342 U. S. 913 (1952).<sup>8</sup>

As applied to the facts of this case, the sentence just noted does not authorize the payment of benefits for temporary disability after the workman has been found to have a permanent total disability. It means only that a lump-sum award for permanent total disability shall be in addition to any benefits theretofore paid or due for temporary disability. If an injury which causes "temporary" disability thereafter develops or proves to be a "total" disability, it is no longer a "temporary" disability.<sup>9</sup>

The district court was therefore correct in holding that, after the disability was determined to be total

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<sup>8</sup>Lathourakis was allowed and paid \$2,005 for temporary disability suffered prior to his condition becoming fixed into permanent disability. He then received a lump-sum award of \$3,600 for fifty per cent permanent disability, and payments for temporary disability thereupon ceased.

<sup>9</sup>Keehn v. Alaska Industrial Board, note 3, supra.

and permanent, Jenkins was no longer entitled to monthly benefits for temporary disability.

In view of the ruling just stated, we feel constrained to discuss one more aspect of this case. The determination that Jenkins' disability was total and permanent was made by the board in July, 1951. The board, however, attempted to relate back this determination of his status to October 28, 1950, when the second member was amputated. The board took this action under the mistaken view that any payment for temporary disability was improper. The result was that there was deducted from Jenkins' \$8,100 award for permanent total disability the thirty-eight weekly payments he had received as temporary disability payments since the October date. As before indicated, the total sum so deducted was \$3,645, leaving Jenkins but \$4,455 of his lump-sum award. This action was confirmed by the board's decision of February 6, 1953, except that an award of \$476.70 was made for temporary disability benefits due prior to October 28, 1950.

In our view, the temporary disability payments should not have been deducted from the lump sum to which Jenkins became entitled by virtue of being permanently and totally disabled. We say this notwithstanding the established fact that the loss of members warranting a classification of total and permanent disability unquestionably occurred on October 28, 1950.

Our opinion on this point is governed by the paragraph of § 43-3-1 which relates to temporary disability. It is there provided that when the injury devel-

ops or proves to be such as to entitle the employee to compensation under some other provision of the schedule (in this case, the provision relating to total and permanent disability), the amount so paid or due him under the temporary disability schedule shall be in addition to the amount to which he shall be entitled under such other or permanent disability schedule.

We have heretofore interpreted the words "and it shall afterwards develop", as used in § 43-3-4, to include not only changes in physical condition, but also the disclosure of errors of law in interpreting the statute. Section 43-3-1, now under consideration, uses these same quoted words plus the words "or proves." The added words do not, in our view, affect the meaning to be attributed to this provision. We therefore construe this provision of § 43-3-1 in the same way the similar provision in § 43-3-4 has been construed.

Until July 25, 1951, when the employer and the insurance company reclassified appellant as totally and permanently disabled, he was entitled to receive the temporary benefits which were being paid to him, because he was then classified as temporarily disabled. It follows that, under the paragraph of § 43-3-1 to which reference has been made, the lump-sum payment awarded on July 25, 1951, should not have been reduced by the sum Jenkins had received, or there was then due him, as a temporary disability award.<sup>10</sup>

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<sup>10</sup>Libby, McNeill & Libby v. Alaska Industrial Board and Lathourakis, *supra*. It was pointed out that the prior 1929 act did require the amount paid for temporary disability to be deducted



There is good reason for this statutory requirement. Benefits for temporary disability are determined as a percentage of average daily wages, and are paid at the time compensation is customarily paid for labor performed at the employer's plant. See § 43-3-1. Such benefits, therefore, are considered as income, and are normally treated and expended as such by workmen covered by the act. Lump-sum payments for permanent total disability, on the other hand, are intended to represent capitalization of future earnings.

Hence, if a workman should rely upon the classification of a disability as temporary and treat payments so received as income, the deduction of those payments from his award for permanent disability would leave the injured workman with a sum much less than what the legislature intended as a capitalization of his future earnings.

We accordingly hold that the lump-sum payment of \$8,100 should be in addition to the \$3,645 paid for temporary disability on and after October 28, 1950, and in addition to the \$476.70 award overdue for temporary disability prior to October 28, 1950.

This deduction question was not presented in the trial court, and was not argued in the briefs. It was

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from the award under other provisions of the act. This was changed when the present language was enacted in 1946.

The provisions of § 43-3-4 providing for the deduction of amounts already paid, and providing that a new award may be made effective from date of injury, relate to cases wherein a "higher rate of compensation" is awarded. When the employer and the insurance company decided to reclassify appellant as totally and permanently disabled, they were not awarding him a higher rate of compensation.



dealt with to some extent during oral argument. Normally, we would not consider and determine a question not presented in the trial court and in briefs. This case, however, has been pending for more than five years, thus rendering a remand undesirable. The point under discussion is a matter of public interest in connection with the administration of an important act having wide application. We have therefore considered it appropriate to depart from our usual practice, noted above, so that the case can finally be disposed of on the basis of this opinion.

The judgment is modified in accordance with the views expressed in this opinion, and in all other respects is affirmed.

**CHIEF JUDGE DENMAN**, dissenting:

I dissent from the majority opinion's harsh and unjust conclusion resulting from its failure to apply to the relationship between the statutory provisions for total permanent and total temporary disability, the same liberal rule of interpretation of the Supreme Court and this court,<sup>1</sup> that the majority opinion does in considering the statute's time limitations.

It is obvious and admitted by the majority opinion that an employee's loss of two limbs, here a hand and a foot, does not create his total disability to work. There are many employments for a person with one

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<sup>1</sup>*Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932); *Libby, McNeill & Libby v. Alaska Industrial Board*, 191 F.2d 262, 264 (Cir. 9, 1951).

good hand who can walk with an artificial leg or for one who has two good hands and a wheel chair.

Hence the statement of the statute that such loss "shall constitute total and permanent disability and be compensated according to the provisions of this act with reference to total and permanent disability" can well be construed liberally as providing no more than that one having such an injury shall receive a certain amount of money in any event. Since such a liberal construction would leave to the injured man after the amputation the right to claim compensation for the actual continuing temporary disability from the infections in his left foot, we are required to make it.

The statute provides for payment from the employer for "*all* injuries causing temporary disability."<sup>2</sup>

If this provision covers all temporary disabilities from a single industrial accident, the narrow and strict construction of the majority which reads "*all*" to mean all injuries except those accompanied by a loss of two limbs, etc., distorts the statutory language by depriving the word "*all*" of its plain meaning in

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<sup>2</sup>The pertinent portion of Section 43-3-1 reads as follows:

"*Temporary disability.* For *all* injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule." [Emphasis added.]

violation of long established principles of statutory construction.<sup>3</sup>

The Court's narrow construction leads to a most anomalous result. Under the opinion's rationale, a man like Jenkins who loses two limbs in or shortly after an accident is entitled to total permanent compensation immediately (\$8,100),<sup>4</sup> but receives nothing thereafter during a long period of hospitalization which may last for several years. On the other hand, a worker who has both legs crushed in an accident (his injury being less serious initially), and is hospitalized for several years while physicians fight to save his legs, gets temporary disability as long as he is in the

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<sup>3</sup>Rice v. Minn. & N.W.R.R., 66 U.S. 358, 379 (1861) ("... it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together."); United States v. Raynor, 302 U.S. 540, 547 (1938) ("A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."); 2 Sutherland, Statutory Construction § 4705.

<sup>4</sup>The provision of the Alaska statute for a lump sum award for total permanent disability which is fixed in amount regardless of the injured man's previous wage rate is unique. All other workmen's compensation statutes in this country provide for periodic payments which in all jurisdictions except three vary in amount according to the workman's pay rate prior to his injury. See 2 Larson, Workmen's Compensation Law, App. B, Table 8, pp. 524-6 (1952), consisting of a comparison of the total permanent disability provisions of the workmen's compensation laws of 53 jurisdictions. Liberal interpretation of this unique statute requires that we not construe it to deprive the injured man of the temporary compensation which is based on his wage loss and limit him to a mere fixed sum unrelated to his loss of wages in the absence of clear statutory mandate to that effect.

hospital until a medical end result is reached. This may amount to many thousands of dollars (65% of his weekly pay). If at the end of that time amputation is found necessary, he then receives the total permanent disability lump sum payment in addition. Thus although the end result in each case is the same, the man whose injury was apparently less severe initially gets more compensation. And if the man whose legs were merely crushed did not have to have them eventually amputated, he still could receive more compensation than one in Jenkins' position if his period of temporary disability was long enough.<sup>5</sup>

Nothing in the statute compels this result. In fact the second sentence of the provision of Section 43-3-1 defining temporary disability suggests that permanent and temporary disability payments may both be payable at the same time for one injury, and nothing therein restricts this result to cases where the workman becomes entitled first to temporary disability and thereafter to permanent disability.<sup>6</sup> In my view the argument of the opinion based on the distinction be-

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<sup>5</sup>At the rate of total temporary compensation to which Jenkins was entitled (\$95.34 per week) the temporary compensation would exceed the total permanent lump sum payment (\$8,100) after only 20 months of total temporary disability. According to the determination of the Board, Jenkins' total temporary disability continued more than three years after his injury.

<sup>6</sup>That sentence reads: "And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule."

tween "injuries" and "disabilities" ignores the realities of the situation and relies on semantics. Such semantical refinements are not sufficient to support the harsh and unreasonable construction of the statute which leads to the conclusion that one who is less severely injured (and suffers less disability) may receive more compensation than one who is more seriously disabled. The words of the Supreme Court in *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 413 (1932), appear pertinent:

"It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act."

The temporary disability provisions of the Alaska statute are typical of those of most other jurisdictions in this country. In the absence of a clear statutory mandate to the contrary, the Alaska statute should be construed, as have those of other jurisdictions, as providing temporary disability compensation during the healing period until a medical end result is reached.<sup>7</sup>

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<sup>7</sup>See, e.g., *McCall v. Potlach Forests*, 208 P.2d 799, 801 (Ida. 1949); *Shell Oil Co. v. Industrial Commission*, 119 N.E.2d 224, 230 (Ill. 1954); *Gorman v. Atlantic Gulf & Pacific Co.*, 12 A.2d 525 (Md. 1940); *Laurel Daily Leader v. James*, 80 So.2d 770, 773 (Miss. 1955); *Fallis v. Vogel*, 290 N.W. 461 (Neb. 1940); *Petersen v. Foundation Co.*, 25 A.2d 1 (N.J. 1942); *Peerless Sales Co. v. Industrial Commission*, 154 P.2d 644 (Utah 1944); *Johnson v. Cox*, 82 So.2d 562 (Ala. App. 1955).



There is nothing contrary to this in this Court's opinion in *Keehn v. Alaska Industrial Board*, 230 F.2d 712 (Cir. 9, 1956). There the physicians had determined that a medical end result had been reached, a 40% permanent disability award had been made and "A compromise and release signed by the parties." 230 F.2d at 713. Here no such result had been reached and no compromise settlement made, and we are concerned with the initial healing period prior to the occurrence of a medical end result.

It appears to me that the statement of the majority opinion that "in the case of the loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the act"<sup>8</sup> which, the opinion asserts, is supported by *Larson*, has no such support as applied to the issue presented in this case. This conclusive presumption is applied, as *Larson's* text shows, to prevent the deduction of any wages actually earned by a worker who is totally and permanently disabled within the meaning of a workmen's compensation statute "from his total permanent disability award."<sup>9</sup> Nothing in the text supports the majority's

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<sup>8</sup>Majority opinion, p. 9.

<sup>9</sup>2 *Larson, Workmen's Compensation Law* § 58.10, p. 42 (1952). See, e.g., *Great American Indemnity Co. v. Segal*, 229 F.2d 845 (Cir. 5, 1956), where the court, in affirming a total disability award and disallowing a deduction for wages earned by the disabled worker, quoted a Texas decision as follows:

"[T]otal incapacity does not mean utter inability to do any work at all, but that a man's disability is total, within [the meaning of the statute], when he can no longer 'secure and



statement that "this conclusive presumption cuts both ways" and therefore that it must be applied to reduce the injured workman's compensation.<sup>10</sup> So applied, the presumption defeats the purpose which it was created to serve (i.e., to maximize the recovery of the injured man), and as applied to the present facts, results in a construction of the statute which violates the principle of the *Norton* case, *supra*.

It is significant that under other workmen's compensation statutes which closely resemble the Alaska statute in their provisions for the determination of permanent and temporary disability, a large number of cases have held that where "the effects of the loss of a member extend to other parts of the body . . . the schedule allowance for the lost member is not exclusive."<sup>11</sup> These cases are but another illustration of the liberal rule of construction in workmen's compensation cases.<sup>12</sup> Since temporary disability compensation covers the healing period,<sup>13</sup> it appears to me that a

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hold employment for physical labor' such as he had to do to make a living prior to his injury."

229 F.2d at 846.

<sup>10</sup>Majority opinion, p. 9.

<sup>11</sup>Larson, *op. cit.* *supra* note 9, § 58.20 p. 44, cases cited note 38.

<sup>12</sup>Larson, *op. cit.* *supra* note 11, p. 45. The text writer suggests that "destruction of the most favorable remedy should not be read into the act by implication." *Ibid.* In contrast to other workmen's compensation statutes, the provision of the Alaska Act for temporary disability compensation is more adequate than its permanent disability compensation provisions (note 4 *supra*). Hence the above quoted principle here strongly supports affirmance of the Board's decision.

<sup>13</sup>Note 7, *supra*.

fortiori the same rule of construction requires us to hold that where the failure of an amputation to heal has inflicted upon the workman a temporary disability in fact far greater than the loss of the limb itself he is entitled to total temporary disability compensation until the healing of the amputation is completed.

Instead of the liberal treatment to which this unfortunate man and his family are entitled the majority is leaving him unpaid for the long period of *actual* total disability admittedly arising from the electric burning in his employer's service, and a most harmful rule of construction is established for this circuit.

POPE, Circuit Judge, dissenting:

What Judge Denman has pointed out in his footnote, 4, namely, that the lump sum payment under the Alaska statute is in no way related to the wage scale of the injured workman, has convinced me that it is not proper to apply here what the majority opinion calls a "basic principle of all workmen's compensation," that is, that "benefits relate to loss of earning capacity and not to physical injury as such." My difficulty is in seeing how we can read a "basic principle" into a statute like this one which bears evidence of having been drawn on a very different theory.

The majority opinion says: "One may have a permanently injured arm and a temporarily injured leg." Just as self-evident is the proposition that one may have a permanently injured arm and leg and a temporarily injured leg, or he may lose an arm and a leg and have a temporarily injured leg. That is this case.

The opinion further says: "The individual receiving such an award [i.e., for loss of an arm and a leg] may actually be able to continue to do some work." I have not been able to find in the statute anything which says that if that ability to continue to do some work is temporarily impaired by injury of the remaining leg, he shall receive no compensation for that distinct temporary disability.

The majority opinion appears to get away from that by asserting the existence of a conclusive presumption that "cuts both ways." According to the opinion it "cuts both ways" so that although the person receiving the lump sum award may "actually be able to continue some work" yet he is conclusively presumed not to be able to do what he is "actually" able to do. The opinion arrives at this conclusive presumption that "cuts both ways" by extending the presumption discussed by Larson (see footnote 7) in a manner for which the cases cited by Larson furnish no authority. Those cases indulge the conclusive presumption for the *protection* of the workman and to prevent him from losing his total permanent disability award. I think the Alaska statute does not warrant creating a presumption that cuts the other way and minimizes the compensation which the workman might otherwise claim.

It is a universally accepted rule relating to workmen's compensation laws that they should be liberally construed in favor of the injured workman. When I know it is a fact, as the majority opinion concedes, that a workman who has lost an arm and a leg may

actually be able to continue some work and that such work may for the time being be prevented by what the opinion calls a "temporarily injured leg," I cannot be persuaded that I should create a new double-edged presumption that what I thus know to be possible is as a matter of law impossible.

I am persuaded that if we would not import into this unique statute any "basic principle" or "conclusive presumption" not actually found in the act itself, and would just take this statute by its four corners and apply the usual liberal construction in favor of the injured workman, we would have to find that it provides that the fixed award for certain specified injuries was not intended to bar further compensation for the temporary loss of such earning power as remained after the injury.

With Judge Denman I think the judgment should be reversed.

(Endorsed:) Opinion and Dissenting Opinions.  
Filed Apr. 29, 1957.

Paul P. O'Brien, Clerk.

*United States Court of Appeals  
for the Ninth Circuit*

ALASKA INDUSTRIAL BOARD, and CARL  
E. JENKINS,

*Appellants,*

vs.

CHUGACH ELECTRIC ASSOCIATION, INC., a  
corporation and GENERAL ACCIDENT,  
FIRE AND LIFE ASSURANCE CORPORA-  
TION, LTD., a corporation,

*Appellees.*

No. 14,616

JUDGMENT.

Appeal from the District Court for the District of Alaska, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, First Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court be, and hereby is modified in accordance with the views expressed in the opinion of this Court, and in all other respects the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellants and against the Appellees.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

(ENDORSED) Judgment

Filed and Entered: April 29, 1957

PAUL P. O'BRIEN, Clerk.



# **ALASKA WORKMEN'S COMPENSATION ACT.**

Sections 43-3-1 to 43-3-39, Alaska Compiled Laws Annotated, 1949.

Section 43-3-1. Employments covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability.

Any person or persons, partnership, joint stock company, association or corporation, employing one or more employees in connection with any business occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employees shall be so injured and such injuries shall result in his or her death.

[*Compensation allowed.*] The compensation to which such employee so injured, or, in case of his or her

death, if death results from such injury, such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

\* \* \* \* \*

[*Total and permanent disability.*] Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (Married person.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00).

\* \* \* \* \*

[*Partial permanent disability.*] Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, \$720.00.

1 (b) In case the employee was married but had no children, \$900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, \$1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, \$450.00.

2 (b) In case the employee was married but had no children, \$585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, \$720.00.

For the loss of any other Finger than the Index Finger and Thumb, \$270.00.

For the loss of a Great Toe, \$450.00.

For the loss of any other Toe than the Great Toe, \$180.00.

For the loss of a Hand:

3 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

3 (b) In case the employee was married but had no children, \$2,880.00.

3 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

4 (b) In case the employee was married but had no children, \$3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, \$3,600.00 and \$450.00

additional for each such additional child, the total amount not to exceed, however, \$4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, \$2,160.00:

5(b) In case the employee was married but had no children, \$2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, but not to exceed the total sum of \$3,600.00.

For the loss of a leg:

6 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

6 (b) In case the employee was married but had no children, \$3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, \$3,600.00 with \$450.00 for each such additional child, not to exceed the total sum of \$4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

7 (b) In case the employee was married but had no children, \$2,880.00.

7 (c) In case the employee was either married, or a widower and had one child. \$2,880.00 plus \$360.00 for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Ear: \$360.00.

For the loss of hearing in one Ear: \$720.00.

For the loss of the Nose: \$720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

[*Disfigurement.*] The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars (\$2,000.00).

[*Temporary disability.*] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily

wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

[*Loss of members as total permanent disability.*] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

[*Amputations.*] Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and the ankle shall be considered equivalent to the loss of a leg.

[*Other permanent partial injuries.*] Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would



be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars (\$7,200.00).

**Section 43-3-10, Alaska Compiled Laws Annotated, 1949.**

Section 43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred.

The right to compensation for an injury and the remedy therefore granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the personal or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on ac-

count of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

**ALASKA EMPLOYMENT SECURITY COMMISSION**  
**Annual Report to Governor of Alaska**  
**Fiscal Year Ended June 30, 1956**

• TABLE 9 •

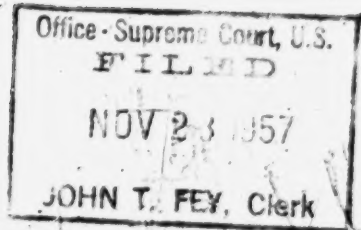
**COMPARISON OF BENEFIT PAYMENTS BY LAST INDUSTRY AFFILIATION  
DURING FISCAL YEAR 1956**

INDUSTRY	Total		Intrastate*	Interstate*
	Amount	%		
<b>TOTAL</b>	<b>\$5,105,948</b>	<b>100.0</b>	<b>\$4,015,627</b>	<b>\$1,090,321</b>
Agriculture, Forestry and Fishing	172,535	3.4	158,437	14,098
Mining	354,322	6.9	299,825	54,497
Contract Construction	2,462,940	48.2	2,003,507	459,433
Manufacturing	891,904	17.5	554,397	337,507
Salmon Canning	(604,310)	(11.8)	(339,798)	(264,512)
Lumbering**	(190,954)	(3.8)	(141,929)	(49,025)
Other Manufacturing	(96,640)	(1.9)	(72,670)	(23,970)
Transportation, Communication and Utilities	234,518	4.6	205,501	29,017
Wholesale & Retail Trades	392,714	7.7	321,710	71,004
Finance, Insurance and Real Estate	11,422	.2	11,422	—
Service	153,459	3.0	126,591	26,868
Government	432,134	8.5	334,237	97,897

\* Intrastate payments are those made to claimants in Alaska.

\* Interstate payments are those made to claimants in the States.

LIBRARY  
SUPREME COURT, U.S.



# In the Supreme Court

OF THE

**United States**

OCTOBER TERM, 1957

**No. 303**

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Petitioners,*

vs.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

## BRIEF FOR THE PETITIONERS.

J. GERALD WILLIAMS,

Attorney General of Alaska,

Juneau, Alaska,

*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,

P. O. Box 1121, Juneau, Alaska,

*Counsel for Petitioner  
Carl E. Jenkins.*

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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

**BRIEF FOR THE PETITIONERS.**

**OPINIONS BELOW.**

The opinion of the Court of Appeals (R. 88-106)  
is reported at 245 F. 2d 855; and the opinion of the  
District Court (R. 56-60), at 122 F. Supp. 210.

## JURISDICTION.

The judgment of the Court of Appeals was entered on April 29, 1957 (R. 107). The petition for a writ of certiorari was filed on July 22, 1957, and was granted on October 14, 1957. The jurisdiction of this Court rests on Title 28, U.S. Code, Sec. 1254 (1).

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## STATUTES INVOLVED.

This case involves the construction of certain provisions of the Alaska Workmen's Compensation Act. The relevant portions of the Act are too lengthy to be set out verbatim here, and hence are printed in the Appendix, *infra*, pp. i-xii.<sup>1</sup>

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## QUESTION PRESENTED.

In an industrial accident a workman lost his left arm, his right leg and four toes of his left foot. By reason of the loss of the arm and leg, the workman became entitled to a scheduled lump-sum award of compensation for "total permanent disability." His left foot, however, was slow in healing, and this resulted in the workman being totally (but only temporarily) disabled from earning a living, for a limited period of time.

During the period of healing of the left foot, and after having received the award for the loss of an

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<sup>1</sup>Alaska Compiled Laws Annotated 1949, Vol. 2, Secs. 43-3-1, 43-3-10, 43-3-22, pp. 1221, 1223-1228, 1235, 1244-1245.

arm and the other leg, was this workman entitled to compensation for temporary disability?

### STATEMENT.

The facts, essential to a consideration of the question presented here, are as follows:

1. On September 21, 1950, while in the course of his employment with Chugach Electric Association, Carl E. Jenkins came into contact with a high voltage electric line and received serious injuries. This resulted in a series of three surgical operations, i.e., the amputations of Jenkins' left arm near the shoulder, the right leg below the knee, and four toes of his left foot (R. 13-14, 15-16, 18-20, 41-42, 56). The last amputation (the right leg) took place on October 28, 1950 (R. 46).

2. The left foot failed to heal (R. 12-16, 18, 22-27), and was still under treatment at the time of the doctor's last report of December 17, 1953 (R. 26-27). Because of this, Jenkins had been unable to secure gainful employment (R. 19, 27, 42), and was thus in a state of continuing disability—temporary in duration, but while it lasted, total in scope.

3. Following the injury, respondents paid Jenkins compensation for temporary total disability under the "Temporary disability" provision of the Alaska Workmen's Compensation Act, Sec. 43-3-1, Alaska Compiled Laws Annotated 1949.<sup>2</sup> This was paid at

<sup>2</sup>Appendix, *infra*, p. v.

the rate of \$95.34 a week for approximately 38 weeks—a total of \$3,645.00 (R. 36, 42).

4. On July 25, 1951, respondents reversed their position. They decided that Jenkins had been totally and permanently disabled since October 28, 1950, when the last amputation took place. They recognized that he was entitled to \$8,100.00, as the scheduled lump-sum award for the loss of an arm and a leg,<sup>3</sup> but deducted from it the sum of \$3,645.00 previously paid as temporary total disability. Hence, respondents sent to Jenkins on July 25, 1951, their check for \$4,455.00—for the purpose of closing the claim (R. 44).

5. Jenkins then applied to the petitioner, Alaska Industrial Board, for continuing benefits for temporary disability, despite the allowance of the lump-sum award for permanent total disability (R. 39-40). This application was granted by the chairman of the Board on November 12, 1952, on the ground that temporary total disability had continued since October 28, 1950. He awarded Jenkins \$3,645.00, which respondents had deducted from the \$8,100.00 lump-sum payment, and in addition awarded further compensation for total temporary disability caused by the failure of the left foot to heal and "until a medical end result is reached" (R. 41-45).

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<sup>3</sup>Sec. 43-3-1, ACLA 1949. "[loss of members as total permanent disability.] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability."

6. On February 6, 1953, after a review by the full membership of the Board, the chairman's decision and award was vacated and set aside by the other two members. Here it was held that since Jenkins had suffered a "total permanent" disability on October 28, 1950, when the final amputation took place, no compensation for "total temporary" disability was thereafter payable (R. 46-47). However, Jenkins was allowed \$476.70 as total temporary disability compensation for a period of 35 days prior to the operation of October 28, 1950 (R. 47).

7. Later the matter was considered again, and on January 8, 1954, the Board reversed its prior action of February 6, 1953. This time the Board held that a condition of total temporary disability had existed on and after October 28, 1950, and that it still continued since no "medical end result" had been reached (R. 52). This meant that Jenkins was entitled to temporary disability compensation at the rate of \$95.34 a week from October 28, 1950 and until his left foot had either healed or had been restored physically as far as possible by medical means.

8. Thereafter, respondents instituted this action in the District Court to set aside the Board's decision (R. 28).<sup>4</sup> On July 27, 1954, that Court filed its written opinion reversing the Board's action and holding that an award for temporary total disability could not be granted for physical disability arising from the same accident in which a scheduled, lump-sum award for "total permanent disability" had been granted (R.

<sup>4</sup>Sec. 43-3-22 ACLA 1949—Appendix, *infra*, p. x.

56-60). Judgment was entered for respondents on July 30, 1954 (R. 61-62). Petitioners applied for rehearing (R. 62-63), but this was denied by the District Court on October 7, 1954 (R. 64).

9. An appeal was taken by petitioners (R. 63), and the matter was argued twice: once, before the regular 3-judge division of the Court of Appeals (R. 84), and then later, before the same Court sitting in banc (R. 85-86). On April 29, 1957, the Court below upheld the ruling of the District Court. It was held that after a workman had lost an arm and a leg and had thus suffered injuries severe enough to entitle him to a scheduled award for "total permanent disability", he could not thereafter be awarded weekly benefits for "total temporary disability"—despite the fact that other and separate injuries, suffered in the same accident, were slow in healing and thus prevented the workman from becoming gainfully employed for a limited period of time (R. 94-97).<sup>5</sup>

10. Chief Judge Denman and Judge Pope dissented. It was their opinion that a liberal construction of the Alaska Workmen's Compensation Act required a holding that Jenkins was entitled to temporary disability compensation during the period of healing of his left foot, despite the fact that he had received a fixed, lump-sum award just by reason of having had two amputations of other members of his body. They felt that the majority had interpreted the Alaska Act harshly and unreasonably, and had established a most harmful rule of construction for the circuit. They,

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<sup>5</sup>245 F. 2d 855, 860-862.



therefore, urged that the judgment of the District Court be reversed (R. 100-106).<sup>6</sup>

### **SUMMARY OF ARGUMENT.**

1. The Alaska Workmen's Compensation Act, like other legislation of this type, places benefits for physical injury in two separate and distinct categories. One provides payments for wage loss, based on a concept of actual inability to earn wages during the healing period. The other, which ignores wage loss entirely, provides lump-sum scheduled awards which are based on a medical appraisal of the permanent physical impairment resulting from an injury.

There is no inconsistency in permitting payments of both types of compensation to an injured workman, even when he suffers a loss of two limbs in an accident and thus immediately becomes entitled to the maximum scheduled award for permanent disability. If there is incurred in the same accident an injury separate and distinct from those that qualify the man for the maximum award for permanent disability, and this separate injury fails to heal for a certain period of time, this injured workman should receive the "Temporary disability" payments provided for in the Act as compensation for loss of wages during the healing period. The statute requires such payments for "all injuries causing temporary disability", and other language in the Act does not require or suggest

that "all" should be given other than its ordinary and plain meaning. In fact, only this broad and unlimited construction of "all" is appropriate in the light of the context of the entire law. Consequently, when Jenkins' left foot failed to heal for a limited period of time and thus deprived him of the opportunity to earn wages, he ought to have been paid temporary disability compensation for this period—regardless of the fact that when he lost his right leg and left arm in the same accident he immediately became entitled to the fixed award of compensation for permanent and total disability.

2. The Court below has held that if a man loses two limbs in an industrial accident, and thus becomes at once entitled to the maximum scheduled award for total and permanent disability, he is "conclusively presumed" to have no remaining ability to work. Therefore, it is said, there is no foundation for temporary disability benefits, despite the fact that the slowness in healing of a separate and distinct injury incurred in the same accident causes this man an actual temporary disability and consequently loss of wages.

This narrow construction of the Act leads to the most incongruous results. It would mean that one who is less severely injured, and suffers less disability, would receive more compensation than one who is more seriously disabled. It would mean that if Jenkins were injured in some other employment and thus unable to earn wages for a limited period of time, he could receive no compensation at all under the Act.

It would mean that if a man loses one arm in an industrial accident and thus incurs a 50% partial permanent disability, he should receive as temporary disability compensation during the healing period not 65% of his actual wages, as the statute provides, but only one-half of that amount.

This shows how untenable is the position of the Court below in its interpretation of the Alaska Act. It shows a construction which nullifies the purposes for which the statute was enacted. It is a virtual repudiation of the doctrine that workmen's compensation statutes should be liberally construed in furtherance of such purposes.

---

### **ARGUMENT.**

#### **PRELIMINARY CONSIDERATIONS.**

The facts are not in dispute. Jenkins suffered personal injuries, accidental in nature, which arose out of his employment with respondent, Chugach Electric Association. They were compensable injuries under the Alaska Workmen's Compensation Act.<sup>7</sup> The sole question is whether Jenkins has received the entire amount of compensation to which he is entitled.

If Jenkins had lost only one arm he would have qualified for compensation under the "Partial permanent disability" schedule of the Act, and since he was married and had one child, would have been entitled to the lump-sum award of \$4,050.00. If he had

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<sup>7</sup>Sec. 43-3-1 ACIA 1949—Appendix, *infra*, p. i.

lost only one leg, then he would have received the same scheduled award of \$4,050.00.<sup>8</sup> But since he lost both members in this one accident (the left arm and right leg), he came under the "Total and permanent disability" schedule<sup>9</sup>, and was entitled to the maximum award of \$8,100.00.<sup>10</sup> This is the amount of money that Jenkins has received (R. 36, 42, 44).

The physical condition resulting from these two amputations soon became static, i.e., within one year his wounds had apparently healed for he was fitted with an artificial arm and leg. Although physically impaired to a great degree, nothing further in the way of medical treatment had to or could be done to improve his condition (R. 12-13).

If there had been nothing else the matter, Jenkins would have then had some actual remaining ability to return to work and earn "some sort of a living",<sup>11</sup> in spite of his severe injuries. But in the same accident, and in addition to the two amputations, his left

<sup>8</sup>Sec. 43-3-1 ACLA 1949 [Partial permanent disability]—Appendix, *infra*, pp. ii-v.

<sup>9</sup>Sec. 43-3-1 ACLA 1949 [Loss of members as total permanent disability]—Appendix, *infra* p. vi.

<sup>10</sup>Sec. 43-3-1 ACLA 1949 "[Total and permanent disability] Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) [Married person] If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00)."

<sup>11</sup>See last paragraph of Doctor Howard G. Romig's report of December 17, 1953 (R. 27).

foot was so severely burned that amputation of four toes was necessary. And here the healing process was so slow, and so much trouble was encountered with breakdowns and slough of the tissues,<sup>12</sup> that as late as December 1953 Doctor Romig reported as follows:

"It is a well known fact that injuries of this kind are extensive, severe and long in recovery. I have seen Mr. Jenkins regularly since the date of his injury except for the time he spent in Seattle under the care of Doctor Louis Edmunds.

"As it stands today, Mr. Jenkins' remaining foot is relatively useless but is improving. This foot is unhealed and requires attention regularly.

"As far as I am concerned, Mr. Jenkins is disabled and unable to be gainfully employed since date of injury, because he has been under treatment. The fact that he has been up and about and able to do a few gainful things does not alter this estimation a bit.

"In my opinion he will require rehospitalization for a sympathectomy, re-amputation and plastic repair to the ailing foot. This will restore him to a state of permanent partial disability. After this he should be able to make some sort of a living." (R. 27)

Thus, it was during the period of healing of his left foot that Jenkins suffered a total loss of earning power; it was because of this particular injury that he was unable to be gainfully employed. Although

<sup>12</sup>See Doctor Romig's report to the Alaska Industrial Board of May 2, 1952 (R. 13) and his letter to Attorney John Shaw of July 18, 1952 (R. 79). See also Doctor O'Malley's report of July 18, 1952 (R. 15-16).



this loss of earning power was total while it lasted, it was not permanent; for medical opinion was hopeful, and predicted, that with continued treatment Jenkins would be eventually restored to a "state of permanent partial disability" and then "should be able to make some sort of a living."<sup>13</sup>

The ultimate question, then, is whether during this period of temporary disability Jenkins was entitled to be paid additional compensation, as a partial recompense for wages lost during that period, under that provision of the Act which provides as follows:

"[Temporary disability:] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule. \* \* \*"<sup>14</sup>

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<sup>13</sup>Doctor Romig's report of December 17, 1953 (R. 27). When Doctor Romig refers to the term "state of partial permanent disability" he obviously is not using the term in the precise legal sense as used in the Act, i.e., to denote a specific scheduled award; but is referring to the fact that after Jenkins' foot was healed he would be severely crippled and disabled but would still have some actual remaining ability to do work.

<sup>14</sup>Sec. 43-3-1 ACLA 1949 [Temporary disability].



# 1. The Plain Wording of the Statute Requires the Payment of Additional Compensation.

Workmen's compensation legislation places benefits for physical injury in two categories: (1) wage loss payments based on a concept of actual disability, or proved inability to earn wages during the period of healing and until an injury has become stabilized; and (2) permanent schedule awards, based on medical condition and an appraisal of the permanent effects of an injury after a "medical end result" has been reached, and which ignores wage loss.<sup>15</sup>

The Alaska Act is typical in this respect. Taking the latter category first, the Legislature has set up a series of lump-sum, scheduled awards for "Total and permanent disability"<sup>16</sup> and for "Partial permanent disability".<sup>17</sup> It is clear from reading these sections of the law that when one has been injured in an industrial accident and the injury results in some degree of permanent physical impairment, the injured person will receive a definite amount of money in any event—without regard to proof of actual wage loss. It would be immaterial that the claimant, after the accident, may have been regularly employed at greater earnings than before.<sup>18</sup>

But this does not point to a deviation from the underlying principle of workmen's compensation leg-

<sup>15</sup>Larson, *Workmen's Compensation*, Vol. 2, Sec. 57.10, p. 3; *ibid.*, Sec. 58.10, p. 42 (1952 ed.).

<sup>16</sup>Sec. 43-3-1 ACLA 1949—Appendix, *infra*, p. ii.

<sup>17</sup>Sec. 43-3-1 ACLA 1949—Appendix, *infra*, pp. ii-v.

<sup>18</sup>Larson, *Workmen's Compensation*, Vol. 2, Sec. 58.10, p. 42; *NACCA Law Journal*, May 1948, Vol. 1, No. 1, pp. 35-36.

isolation—that benefits are related to loss of earning capacity and not merely to injury as such. The theory is the same, but some norm or standard (perhaps from observed probabilities) must be devised from the necessities of the case. It would be impracticable to hold open for a lifetime every case that involved some degree of permanent injury, in order that new estimates could be made on the effect of the injury on earning power every time the claimant contended that his earning capacity was being adversely affected. This would be an impossible administrative task, and in order to avoid it the Legislature has established a schedule of arbitrary indemnities for the loss of a leg, an arm, etc., and other permanent bodily injuries.<sup>19</sup>

This establishes what the courts have termed a “conclusive presumption of loss or reduction of wage earning capacity.”<sup>20</sup> Thus, when one under the Alaska Act has lost an arm, he is “conclusively presumed” to have had his earning capacity impaired, and he receives an award of a specific sum of money. If he loses both arms, or one arm and one leg, the conclusive presumption again is that his earning capacity has been impaired—this time to a greater degree—so that he will receive as compensation twice the amount of money that he would have received for the loss of one arm or one leg. This is the

<sup>19</sup>See Larson, *Workmen's Compensation*, Vol. 2, Sec. 58.10, pp. 42-43.

<sup>20</sup>*Bethlehem Steel Co. v. Cardillo*, 229 F. 2d 735, 736 (CA-2 1956); *Travelers Insurance Company v. Cardillo*, 225 F. 2d 137, 144 (CA-2 1955).

maximum amount that the statute allows for permanent injuries.

But specific, arbitrary indemnities paid, or the "price tags" for such injuries, do not in fact represent an actual loss of wages in the future. Thus, if a man receives \$4,050.00 for the loss of an arm, this does not and cannot mean that his future earning capacity, for the remainder of his life, has been reduced by this precise amount. He may earn more, or he may earn less.

Consequently, it is perhaps an unfortunate choice of words that has led the courts to speak of a "conclusive presumption" that there has been any particular degree, such as a 50%, 75%, etc., or even 100%, loss of earning power. What is really meant is that the loss of a member of the body or for some other permanent physical impairment, a certain amount of compensation should be paid in any event, without regard to actual earning power. Thus there is not so much an irrebuttable presumption that there has been a partial or total impairment of capacity to earn wages, as much as there is a legislative declaration that based on experience in the average case there probably has been a degree of such impairment, but that since it is impractical to compute it, actual gain or loss in earnings will be disregarded.

Therefore, as a matter of practical necessity, in cases where permanent physical impairment result from an injury, actual earnings are simply not given any consideration at all. But it does not follow that this is true where the Legislature has expressly meas-

ured the amount of compensation by the injured man's actual wages. This other category of compensation for physical injury, as it has been pointed out above, is based upon wage loss or actual inability to earn wages during a period of healing and until a man is either cured and can get back to work or until he has been restored physically so far as possible by medical means. This is what obviously is contemplated by that provision of the Alaska Act entitled "Temporary disability."<sup>21</sup>

Here it is provided that for all injuries causing temporary disability the injured employee shall be paid, during the period of disability—

"... sixty-five per centum (65%) of his *daily average wages*." (emphasis added).

Further, it is provided that payments shall be made at the time—

"... compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor..."

The "average daily wages" of the employee are determined by his "actual earnings", if they are fairly representative; and if not, then the Alaska Industrial Board must determine such earnings having due regard to—

"... the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance . . . which may affect his *capacity to earn wages in his temporarily disabled condition*." (emphasis added).

<sup>21</sup>Sec. 43-3-1 ACLA 1949—Appendix, *infra*, p. v.

Clearly, then, actual earnings are the foundation of the payment of this class or type of compensation. Therefore, it is illogical to hold, as the Court below did, that when Jenkins received the maximum scheduled award for permanent disability, there immediately arose the conclusive presumption that he had no remaining ability to work and, therefore, that there was no foundation for temporary disability benefits.<sup>22</sup> In the category of scheduled, arbitrary awards for permanent injury, whether partial or total, actual wages are not considered. But in the category of payments of compensation for temporary disability, actual wages not only are considered but constitute the sole basis or measure of the compensation to be paid. The very purpose of payments of the latter type is to compensate the employee for wages lost during the healing period and until he is able to return to work.<sup>23</sup> There simply is no room here for any kind of a "presumption" as to a reduction or loss in wage earning capacity. Established facts alone, and not legal presumptions, govern the disposition of a case where temporary disability compensation is claimed.

Once the distinction between permanent and temporary disability compensation is understood, there is no difficulty in applying the plain wording of the statute to permit the payment of both types of compensation to an injured workman. This is what the statute expressly provides. It refers to "all" injuries

<sup>22</sup>Majority opinion of the Court below (R. 96).

<sup>23</sup>*Vannoy v. Alaska Packers Association*, 12 Alaska Reports 284, 291 (DC-Alaska 1949).



causing temporary disability. The word "all" should be given its ordinary and plain meaning, so as to encompass any injuries whatever—including those where a loss of two limbs suffices to qualify a man for the maximum scheduled award for total and permanent disability. The words "all injuries" are not only capable of this broad, unlimited construction, but in fact, no other construction is even appropriate.<sup>24</sup> Logically, therefore, it should be held that reference is being made here to any kind of an industrial injury, no matter how severe or disabling. If the injury causes a temporary disability in fact, then it is compensable under this part of the statute.

Jenkins was injured on September 21, 1950 (R. 3), his second amputation (the right leg) took place on October 28, 1950 (R. 46), and within one year from the time of the accident he had been fitted with an artificial arm and artificial leg (R. 12). Consequently, it is fair to presume that by September 1951 Jenkins' condition was stabilized; all that could be done for these two limbs had been done, and without reference to other injuries he then should have been able to turn to some type of employment available to a man in his condition.<sup>25</sup>

<sup>24</sup>Cf. *United States v. Five Gambling Devices*, 346 U.S. 441, 449-450, 452, 98 L. ed. 179, 188, 189.

<sup>25</sup>In his dissenting opinion in the Court below, Chief Judge Denman said:

"It is obvious and admitted by the majority opinion that an employee's loss of two limbs, here a hand and a foot, does not create his total disability to work. There are many employments for a person with one good hand who can walk with an artificial leg or for one who has two good hands and a wheel chair." (R. 100.)



However, Jenkins was unable to return to work—not because of the amputations or his “total and permanent disability”, but because of the failure of his other foot to heal (R. 13-16, 18-22, 24-27). This distinct injury was incurred in the same accident as that which necessitated the other two amputations, but it was an injury separate and apart from the other and one which had nothing to do with the permanent disability compensation that was paid. It was a “disability” that caused Jenkins an actual loss of wages, and it was “temporary” because in time it would be remedied (R. 13-14, 26-27). Logically, then, it comes within the purview of “all injuries causing temporary disability”,<sup>26</sup> and it should constitute the basis for payments of compensation for wage loss during the healing period.

Petitioners submit, therefore, that contrary to the thinking of the majority of the Court below, there is a “foundation for temporary disability benefits.”<sup>27</sup> That there may not be a “foundation for an additional partial disability award . . . if it became necessary to amputate Jenkins’ left foot”,<sup>28</sup> is not the point. This is not petitioners’ theory; and in view of the “second injury” provisions of the Alaska Act, it may be that one cannot receive more than the maximum scheduled award for permanent disability.<sup>29</sup> The

<sup>26</sup>Sec. 43-3-1 ACLA 1949 [Temporary disability], *supra*.

<sup>27</sup>See majority opinion of the Court below (R. 96)—245 F. 2d 855, 862.

<sup>28</sup>*Ibid*.

<sup>29</sup>Sec. 43-3-1 ACLA 1949. “(12) [Injury causing total permanent disability when combined with previous disability.] In those cases where an employee receives an injury arising out of and

point that petitioners are making here is based upon quite a different theory: that the Alaska statute provides that a fixed award shall be given for certain specified injuries which cause permanent physical impairment, and in addition, provides compensation for a temporary loss of earning power which remains after the injury.

**2. The Decision of the Court Below Is Unjust. It Repudiates the Rule That Workmen's Compensation Statutes Should Be Liberally Construed.**

The narrow construction of the Act by the Court below leads to the most incongruous results:

(a) A man earning \$145.00 a week might severely burn or crush his arm and leg in an industrial accident, and be hospitalized and receiving medical treatment for a period of three years before he is able to return to work. During this time he would be entitled to receive temporary disability payments in an amount equal to 65% of wages—or a total of approximately \$15,000. It may be that the doctors are able to save his arm and leg and restore them to a point where the Board will “rate” the injured workman as having a 75% partial permanent disability. This would mean that he would then receive

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in the course of his or her employment which, if itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury fund hereinbefore created and provided.”

a scheduled award of approximately \$6,000, which would be in addition to the \$15,000 previously paid.

On the other hand, a man like Jenkins who has had his arm and leg amputated within a month after the accident is immediately entitled to receive \$8,100.00 as permanent disability compensation. Under the rationale of the Court below, he would receive nothing more—despite the fact that he was unable to earn wages for a period of three years while his wounds were healing.

Thus the man who ultimately turns out to be less severely injured than Jenkins receives approximately \$13,000 more compensation. Jenkins is penalized because of the entirely fortuitous circumstance of having his limbs amputated at approximately the time of the accidental injury, rather than three years later. When the Act is readily susceptible of an interpretation that will avoid this harsh result,<sup>30</sup> there is no room for the assumption that the Alaska Legislature intended one who is less severely injured, and suffers less disability, to receive more compensation than one who is more seriously disabled. Cf. *Baltimore and Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 413, 76 L.ed. 366, 369 (1932).

(b) Although the record could not show this, Jenkins returned to work for Chugach Electric Association in January 1955, checking and repairing electric meters. It is conceivable that in the course of this employment he could receive a disabling injury and

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<sup>30</sup>See Part 1 of this brief, *supra*.

thus be unable to earn any wages for a period of several months.

But according to the reasoning of the Court below, when Jenkins lost his arm and leg in 1951 he was "conclusively presumed" to have no remaining ability to work. A logical extension of this interpretation would require the denial of temporary disability payments as compensation for wages actually lost during the period of healing of this hypothetical subsequent injury.<sup>31</sup> This, in spite of the broad scope of the Alaska statute which encompasses *all* employees who receive injuries in the course of their employment, and not merely those persons who, prior to an otherwise compensable accident, have not lost an arm and a leg.

(c) An employee (married and having one child) might lose one arm in an accident, and he immediately would be entitled to \$4,050.00 as compensation for partial permanent disability.<sup>32</sup> Since this would be precisely one-half of the amount that he would receive if he had lost both arms, or an arm and a leg, it is only fair to presume that this man's degree of permanent disability is 50% of total disability.

The Court below has stated that

"\* \* \* In the case of loss of certain members, total and permanent loss of earning power is

<sup>31</sup>There can be no escape from such a harsh conclusion. The majority opinion says this:

"Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits." (R. 96.) 245 F. 2d 855, 862.

<sup>32</sup>Sec. 43-3-1 ACLA 1949 [Partial permanent disability]—Appendix, *infra*, pp. ii-v.

conclusively presumed for the purpose of awarding compensation under the act. \* \* \* Under the presumption, whatever the facts may be, there is no remaining ability to work, and therefore no foundation for temporary disability benefits.”<sup>33</sup>

If this statement is true, then it must logically follow that when a man loses one arm he is conclusively presumed to have suffered a 50% permanent loss of earning power. Thus, the “remaining ability to work” would be only one-half of what it was before the accident, and the temporary disability compensation that this man would be entitled to during the period of healing should be reduced accordingly.

This is the necessary result of the majority decision of the Court of Appeals, even though the Act, without any ambiguity, requires disability payments equal to 65% of a man's actual wages. There is nothing in the law, or in former decisions of the Court below,<sup>34</sup> even remotely suggesting that the amount of the employee's wages should be reduced by the percentage of permanent disability that he has suffered. Untenable as it may be, this is exactly the position of the Court below in its narrow and strict construction of the Act.

<sup>33</sup>R. 96—245 F. 2d 855, 861-862.

<sup>34</sup>See *Libby, McNeill & Libby v. Alaska Industrial Board, et al.*, 191 F. 2d 262, 264 (CA-9 1951).



The hypothetical cases noted above are to illustrate the harsh result of the lower Court's interpretation of the Act, and how unsound its position is. The strict and narrow construction of the statute must necessarily lead to harmful conclusions. If there were a clearly expressed statutory mandate that demanded this, then it would have to be accepted. But when the entire context of the Act reasonably demonstrates that it was drawn on an entirely different theory—a theory that would require the payment to Jenkins of the additional compensation which he is seeking—then the action of the Court below is not far short of a repudiation of the established rule that workmen's compensation statutes should be liberally construed in favor of the injured workman, and not so as to nullify the purposes for which they were enacted. In conclusion, the words of this Court in the case of *Baltimore and Philadelphia Steamboat Company v. Norton*<sup>35</sup> appear to be appropriate:

“\* \* \* Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interests and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. \* \* \*”

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<sup>35</sup>284 U.S. 408, 414, 76 L. ed. 366, 370 (1932). See also: *Voris v. Eikel*, 346 U.S. 328, 333, 98 L. ed. 5, 10 (1953); *Czaplicki v. S. S. Silver Cloud*, 351 U.S. 525, 100 L. ed. 1387 (1956).



**CONCLUSION.**

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, and that of the District Court, should be reversed; and the case remanded to the Alaska Industrial Board for the purpose of awarding further compensation to petitioner, Carl E. Jenkins.

Dated, Juneau, Alaska,  
November 18, 1957.

J. GERALD WILLIAMS,  
Attorney General of Alaska,  
*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,  
*Counsel for Petitioner  
Carl E. Jenkins.*

**(Appendix Follows.)**

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## Appendix

### ALASKA WORKMEN'S COMPENSATION ACT.

Sections 43-3-1 et seq., Alaska Compiled Laws Annotated, 1949.

Section 43-3-1. Employments covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability.

Any person or persons, partnership, joint stock company, association or corporation, employing one or more employees in connection with any business occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employees shall be so injured and such injuries shall result in his or her death.

[*Compensation allowed.*] The compensation to which such employee so injured, or, in case of his or her

death, if death results from such injury, such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

\* \* \* \* \*

[*Total and permanent disability.*] Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (Married person.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00).

\* \* \* \* \*

[*Partial permanent disability.*] Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, \$720.00.

1 (b) In case the employee was married but had no children, \$900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, \$1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, \$450.00.

2 (b) In case the employee was married but had no children, \$585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, \$720.00.

For the loss of any other Finger than the Index Finger and Thumb, \$270.00.

For the loss of a Great Toe, \$450.00.

For the loss of any other Toe than the Great Toe, \$180.00.

For the loss of a Hand:

3 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

3 (b) In case the employee was married but had no children, \$2,880.00.

3 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

4 (b) In case the employee was married but had no children, \$3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, \$3,600.00 and \$450.00

additional for each such additional child, the total amount not to exceed, however, \$4,500.00.

**For the loss of a Foot:**

5(a) In case the employee was at the time of the injury unmarried, \$2,160.00.

5 (b) In case the employee was married but had no children, \$2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, but not to exceed the total sum of \$3,600.00.

**For the loss of a Leg:**

6 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

6 (b) In case the employee was married but had no children, \$3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, \$3,600.00 with \$450.00 for each such additional child not to exceed the total sum of \$4,500.00.

**For the loss of an Eye:**

7 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

7 (b) In case the employee was married but had no children, \$2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 plus \$360.00 for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Ear: \$360.00.

For the loss of hearing in one Ear: \$720.00.

For the loss of the Nose: \$720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

[*Disfigurement.*] The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding however, the sum of Two Thousand Dollars (\$2,000.00).

[*Temporary disability.*] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily



wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

[*Loss of members as total permanent disability.*] The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

[*Amputations.*] Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and the ankle shall be considered equivalent to the loss of a leg.

[*Other permanent partial injuries.*] Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would

be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars (\$7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars (\$7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars (\$1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars (\$5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) [Payments to second injury fund]. Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof,

and which injury entitled him or her to compensation pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial disability payable for the particular injury is determined by the Industrial Board.

(10) [Second injury fund beneficiaries.] The sums required to be paid into the second injury fund under the provisions of Paragraphs (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) [Refund of payments to second injury fund.] In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation,

or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) [Injury causing total permanent disability when combined with previous disability.] In those cases where an employee receives an injury arising out of and in the course of his or her employment which, if itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury fund hereinbefore created and provided.

**Section 43-3-10, Alaska Compiled Laws Annotated, 1949.**

Section 43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred.

The right to compensation for an injury and the remedy therefore granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights

or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the personal or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

**Section 43-3-22, Alaska Compiled Laws Annotated, 1949.**

**Section 43-3-22.** Award to be final and conclusive: Questions of fact: In junction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 [Sec. 43-3-15 herein], if not



reviewed as provided in Section 16 [Sec. 43-3-16, herein], shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the Court in such proceeding may run, be served, and be returnable in accordance with the rules of said Court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the Court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the Court allowing any such stay shall contain a specific finding, based upon evidence submitted to the Court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said Court for its decision and determination.



All such appeals and certified questions of law shall be advanced upon the docket of said Court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on Court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the Court.

Office - Supreme Court, U.S.  
FILED  
JAN 4 1958  
JOHN T. FEY, Clerk

# In the Supreme Court

OF THE

**United States**

OCTOBER TERM, 1957

**No. 303**

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Petitioners,*

VS.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

## PETITIONERS' REPLY BRIEF.

J. GERALD WILLIAMS,

Attorney General of Alaska,

Juneau, Alaska,

*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,

P. O. Box 1121, Juneau, Alaska,

*Counsel for Petitioner  
Carl E. Jenkins.*

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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

## PETITIONERS' REPLY BRIEF.

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This is petitioners' short reply to the two principal arguments made by respondents in their answering brief.

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### 1. TEMPORARY DISABILITY COMPENSATION.

Respondents state that temporary disability terminates in two ways

“... either by return of earning capacity, or by resulting in permanent disability, either total or partial.”<sup>1</sup>

Petitioners have no quarrel with the first proposition; for if there is a return of earning capacity, there is no longer any temporary disability for which compensation should be paid. But petitioners cannot agree with the second hypothesis; it is the result of a gratuitous assumption made by respondents, unsupported by either logic or the unambiguous language of the statute.

Presumably, what is meant by “resulting in permanent disability” is the occurrence of an event whereby it is then apparent that the injured workman is entitled to a definite amount of money as compensation for permanent disability. An instance would be where a man (married and with one child) loses his arm—at the moment of injury, and not later by way of surgical amputation. Immediately he is entitled to the lump-sum, scheduled award of \$4,050.00 for partial permanent disability.<sup>2</sup> Under respondents’ theory there could be no payments for temporary disability, despite the fact that because of the type of injury incurred it might well be several months before this man could return to work and again earn a living. Here there would not even be a “termination” of temporary disability; for there was simply no such disability to begin with.

<sup>1</sup>Respondents’ brief, p. 11.

<sup>2</sup>Sec. 43-3-1 ACLA 1949. See petitioners’ opening brief, Appendix, pp. iii-iv.



Thus, respondents would have us believe that although there was a period of actual temporary disability during the time of healing, there was not, as a matter of law, any such disability at all. Realities must be ignored; facts are replaced by fiction. This, respondents say, is what the law requires.

But the statute<sup>3</sup> does not compel any such pretense; nor does it even suggest that facts should be ignored, to the detriment of the injured workman. It provides that "all injuries causing temporary disability" shall be compensated for by payments to the injured workman of 65% of his daily average wages. It does not provide that such compensation shall be paid only for those injuries which do not result in permanent disability. It provides that such compensation shall be paid "during the period of such disability." It does not limit the payments only to that portion of the period of disability preceding the finding of a certain degree of permanent injury.

In fact, the second sentence of the provision relating to temporary disability suggests that permanent and temporary disability payments can be payable at the same time, or at different times, regardless of the order in which liability for such payments is incurred by the employer. That sentence reads:

"And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary dis-

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<sup>3</sup>Sec. 43-3-1 ACLA 1949 [Temporary disability]. See petitioner's opening brief, Appendix, p. v.

ability, the amounts so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.”

The majority of the Court below has admitted that cases of permanent injury are “cases other than temporary disability”, within the meaning of this statute (R. 94). Thus, when an injury “develops or proves” to be permanent in nature, i.e., when that fact is established, the compensation for temporary disability “so paid or due” the injured workman shall be in addition to the compensation for permanent disability to which he shall be entitled.

The majority, however, has gone further and has added to the statutory language a word that is not there. They say that the words “so paid or due” should be modified by the word “therefore.” Thus, by what amounts to judicial legislation, the payments of temporary disability compensation are restricted to those which have become due prior to the award of a lump-sum payment for permanent disability.

There is nothing in the law which requires this result. The words “so paid” obviously refer to temporary disability compensation which has been paid prior to the award of compensation for permanent disability, or the determination that the injured workman is entitled to such an award. But the words “or due” certainly do not suggest that the payments of temporary disability compensation are restricted only to those which were due or which became due

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<sup>4</sup>Sec. 43-3-1 [Temporary disability], *supra*, note 3.

prior to the permanent disability determination or award. Temporary disability compensation is "due", or is owing to, a worker "during the period of" the temporary disability, and this must logically mean the entire period of such disability, and not merely a portion of such period.<sup>5</sup>

If this were a case where a mechanical reading of the law would create obvious incongruities and destroy the major purpose of the legislation, then there might be justification for avoiding this by reasonable judicial construction.<sup>6</sup> But here there is just the opposite case; incongruities are created and the principal objective of the statute is destroyed if the statutory language is not given its plain and ordinary meaning.<sup>7</sup> There is no reason why the Alaska Legislature could not provide for the payment of both types of compensation at the same time; there is nothing in such a legislative plan which goes beyond the scope of legislative powers. There is, then, no justification for distorting the language of the statute, or so limiting it under the guise of construction, as to defeat the manifest intent of the lawmaking body.<sup>8</sup>

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<sup>5</sup>In the light of the context and evident purpose of the statute, the word "due" should be construed in its larger or broader sense as signifying that which is owing, whether or not the time for payment has arrived. *United States v. State Bank*, 6 Pet. (31 US) 29, 36-37, 8 L ed 308, 310-311 (1832). In fact, this is the primary meaning of the word. *Rumely v. United States*, 293 F. 532, 548 (CA-2 1923).

<sup>6</sup>Cf. *Lawson v. Suwanee Fruit and Steamship Company*, 336 US 198, 201, 206, 93 L ed 611, 614-615, 617 (1949).

<sup>7</sup>See Petitioners' opening brief, pp. 20-24.

<sup>8</sup>See *United States v. Alpers*, 338 US 680, 681-682, 94 L ed 457, 460 (1950).

The difficulty here is that the court below was bothered with the abstract problem of how a man could be totally and permanently disabled and still have some remaining earning capacity which could be temporarily impaired. Since this appeared to involve a "contradiction in terms" (R 93), the decision was made that the legislature could not have meant what it said when provision was made for payment of both types of compensation.

But the Court was looking at the literal meaning of these words when taken out of context, and not at their specific meaning when read in conjunction with the broad purposes of the statute. Petitioners have shown in their opening brief (p. 18) that a man can be paid compensation for permanent and total disability even though his earning power, in truth and for practical purposes, has not been completely destroyed. If this can be the case, then logically it should be permissible to penetrate the fiction of "permanent and total disability", and accept the truth of actual remaining earning capacity. And this, then, leads to the acceptance of the further truth that an injury, separate and distinct from that which gave rise to the permanent and total disability award, can temporarily impair such remaining earning capacity. Thus, in a proper case sound reasoning requires the payment of temporary disability compensation after an award of total and permanent disability. Cf. *Smith v. Industrial Accident Commission*, 44 Cal. 2d 364, 282 P. 2d 64 (1955); *Asplund Construction Company v. State Industrial Commission*, 185 Okla. 171, 90 P. 2d

642 (1939); *Dennis v. Brown*, 93 So. 2d 584 (Fla. 1957); 20 NACCA Law Journal, pp. 88-91 (Nov. 1957).

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## 2. THE JURISDICTIONAL QUESTIONS.

Based upon facts appearing in the record, and under a reasonable interpretation of another provision of the Alaska Workmen's Compensation Act,<sup>9</sup> the Court below made the following determinations:

(a) Jenkins had made a "claim" for temporary disability compensation, within the meaning of "claim" as used in Section 43-3-4 ACLA 1949 (R. 88-90).

(b) Such claim was timely, by reason of being "presented within three (3) years after the injury", within the meaning of Section 43-3-4 ACLA 1949 (R. 88-90); and also by having been filed within two years after injury, within the requirement of Sec. 43-3-29 ACLA 1949 (R. 91).

(c) The Board's reviewing power, or continuing jurisdiction, under this section of the statute is not limited solely to the adjustment of the rate of compensation where there is a change of physical condition, but extends as well to the correction of errors of law in connection with an award previously made (R. 90).

(d) When the Board, on January 8, 1954, held that Jenkins was entitled to temporary disability com-

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<sup>9</sup>Sec. 43-3-4 ALCA 1949. Appendix, *infra*, p. i.



pensation (R. 52), and thus reversed its prior action of February 6, 1953 (R. 46-47), it neither reconsidered nor redetermined any factual questions. Its action was based simply upon a different view of the meaning of the statute. Hence, the fact that no appeal was taken by Jenkins within thirty days after the decision of February 6, 1953 did not make that decision "conclusive and binding",<sup>10</sup> and did not prevent the Board from later reconsidering the question of law presented there (R. 91).

These issues were in controversy in the Court below, and they were decided in a manner favorable to the contentions of petitioners. Hence, when petitioners filed their application for a writ of certiorari, they did not seek review of these issues, or what was referred to by the Court of Appeals as the "jurisdictional question" (R. 88). Their request was limited solely to a review of "the second principal question" presented on the appeal (R. 92).

If issues are in controversy in the Court below, then even in the absence of a cross-petition for a writ of certiorari they are available to a respondent as grounds for affirmance of the judgment of the Court of Appeals.<sup>11</sup> But respondents, without having filed any cross-petition, are not seeking affirmance; they are attacking that portion of the judgment of the Court below which dealt with the question of juris-

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<sup>10</sup>Sec. 43-3-22 ACLA 1949. Petitioners' opening brief, Appendix, pp. x-xii.

<sup>11</sup>*United States v. Carignan*, 342 US 36, 38, 96 L ed 48, 51 (1951).



diction of the Alaska Industrial Board. They are doing this with a view toward enlarging their rights and lessening the rights of petitioners. The rule is settled that this will not be permitted:

“A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.”<sup>12</sup>

Consequently, the arguments made by respondents in the second principal part of their brief<sup>13</sup> should not be considered here.

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<sup>12</sup>*Letulle v. Scofield*, 308 US 415, 421-422, 84 L ed 355, 360-361 (1940). See also: *Federal Trade Commission v. Pacific States P. T. Association*, 273 US 52, 66, 71 L ed 534, 539-540 (1927); *Morley Construction Company v. Maryland Casualty Company*, 300 US 185, 191-192, 81 L ed 593, 597-598 (1937).

<sup>13</sup>Respondents' brief, pp. 20-32.

**CONCLUSION.**

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, and that of the District Court, should be reversed; and the case remanded to the Alaska Industrial Board for the purpose of awarding further compensation to petitioner, Carl E. Jenkins.

Dated, Juneau, Alaska,  
January 3, 1958.

J. GERALD WILLIAMS,  
Attorney General of Alaska,  
*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,  
*Counsel for Petitioner  
Carl E. Jenkins.*

**(Appendix Follows.)**

# APPENDIX

**Appendix.**

## Appendix

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### ALASKA WORKMEN'S COMPENSATION ACT.

Sections 43-3-1 et seq., Alaska Compiled Laws Annotated, 1949.

Section 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee [is] entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part of subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and, on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid except that an award or order increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in

excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

DEC 31 1957

JOHN T. PEY, Clerk

**In the Supreme Court**  
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ALASKA INDUSTRIAL BOARD and CARL E.  
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PORATION, LTD., a corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
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**BRIEF FOR THE RESPONDENTS.**

RAEHL E. ROBERTSON,

P. O. Box 1211, Juneau, Alaska,

*Counsel for Respondents.*

FREDERICK O. EASTAUGH,

P. O. Box 1211, Juneau, Alaska,

*Counsel for Respondents.*



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*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
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**BRIEF FOR THE RESPONDENTS.**

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**OPINIONS BELOW.**

The opinion of the Court of Appeals (R. 85-104) is reported at 245 F.2d 855. The opinion of the District Court (R. 56-60) is reported at 122 F. Supp. 210, 15 Alaska Reports 97.

### **JURISDICTION.**

The judgment of the Court of Appeals was entered on April 29, 1957 (R. 104-105). The Petition for Writ of Certiorari was filed July 22, 1957, and was granted on October 14, 1957. The jurisdiction of this Court is asserted by Petitioners under Title 28, U. S. Code, §1254(1), but Respondents question jurisdiction in this case.

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### **STATUTES INVOLVED.**

This case involves the construction of certain sections of the Alaska Workmen's Compensation Act (Appendices A and B), namely: Sections 43-3-1, 43-3-4, 43-3-22 and 43-3-29 (Appendix pp. 10, 17, 37, 44).

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### **QUESTIONS PRESENTED.**

While the question presented in the Petition for Writ of Certiorari (p. 2) is in the identical language as stated in Petitioners' Brief (pp. 2-3), it should be more fairly stated as:

Under the Alaska Workmen's Compensation Act is an employee, who suffers total permanent disability and is awarded and paid compensation therefor, entitled to be paid temporary disability compensation for a period following from and after the date that he suffers total permanent disability, for an injury that he suffered at the same time and in the same accident wherein he suffered total permanent disability and evidence whereof was before the Alaska Industrial



Board at its hearing which resulted in awarding total permanent disability compensation (R. 46).

Respondents believe they are also entitled to present the question of lack of jurisdiction, namely:

This Court has no jurisdiction because the Alaska Industrial Board was without jurisdiction to make its decision of January 8, 1954 (R. 52).

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#### **STATEMENT.**

With respect to the ten numbered paragraphs of Petitioners' Statement (Pet. Brf. pp. 3-7), Respondents either agree or urge modification as follows:

1. Respondents agree.
2. Respondents agree.
3. Petitioners omitted to state that Respondents also paid hospital and medical benefits of \$15,204.78 (R. 38, 57) for more than the statutory period required (R. 59).
4. Respondents did not reverse their position July 25, 1951, but on that date, upon advice of counsel (R. 54), they recognized Jenkins was entitled to permanent total disability compensation of \$8,100.00 and paid it (R. 44), which payment was modified by the Full Board's award of February 6, 1953 (R. 46-47), to require also the payment of temporary disability compensation of \$476.70 for the period from September 21, 1950, to October 28, 1950, which award was sustained by the District Court (R. 56-60).

5. Respondents submit that Jenkins did not apply to the Alaska Industrial Board for temporary disability, but by his amended application of August 14, 1951 (R. 39-40), merely requested a hearing with respect to the amount owed.

6. Respondents submit that this paragraph should be amended to also show that Jenkins was allowed *and paid* \$476.70 (R. 54) as temporary disability compensation for the period of 35 days from September 22, 1950, the date after the accident until the day before his operation on October 28, 1950, on which date the Full Board held he sustained total permanent disability (R. 46-47).

7. This statement correctly should read: The matter came on for hearing again pursuant to the Application (R. 48-49) of Jenkins and the Board reversed (R. 52) its prior action of February 6, 1953 (R. 46-47), and the Board on January 8, 1954, held that "a condition of temporary total disability existed on October 28, 1950, and continues to this date, no end medical result having been reached." (R. 52). This meant that under that decision Jenkins was entitled to temporary disability compensation at the rate of \$95.34 a week from October 28, 1950, until January 8, 1954.

8. Respondents agree.

9. This statement should be amended to include that on April 29, 1957, the Court below (R. 97) upheld the ruling of the District Court (R. 56-60), except to modify the latter's decision by holding that the temporary disability compensation of \$3645, paid by Re-

spondents to Petitioner Jenkins prior to July 25, 1951, should not have been deducted from the \$8100 that was paid (R. 44), although the Court below (R. 95) held that total and permanent disability occurred on October 28, 1950, and that the deduction question was not presented in the trial court or argued in the briefs (R. 97). The third sentence of this statement should be modified by inserting after "total permanent disability" the phrase "under that section of the statute which requires that such injuries 'shall constitute total and permanent disability and be compensated according to the provisions of the Act with reference to total and permanent disability.'" (Appendix, p. 11).

10. Respondents agree with the statement, but not with the conclusion of the dissenting opinion.

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#### **ARGUMENT.**

The Alaska Workmen's Compensation Act, hereinafter designated as "the Act," (Sections 43-3-1 through 43-3-39, ACLA 1949, as amended by Ch. 104, SLA 1949, [Appendices A and B, pp. 1 to 53]), which was in effect at the time of the accident on September 21, 1950, but which was subsequently further amended by Ch. 60, SLA 1953, effective June 24, 1953, and Ch. 141, SLA 1955, effective June 27, 1955, but which are not pertinent, not having been in effect at the time of the accident.

**COMPENSATION, UNDER ACT, IS BASED UPON  
LOSS OF EARNING POWER.**

The Act does not deviate from or indicate any purpose other than to comply with the principle that compensation is based upon loss of earning power, as early announced by this Court.<sup>1</sup>

**CLASSES OF DISABILITY ENTITLED TO COMPENSATION.**

Other than for death, the Act prescribes compensation for five classes of disabilities:

1. Total and permanent disability (Appendix, p. 6).
2. Partial permanent disability, fixing specified sums for loss of specified members (Appendix, pp. 7-10).
3. Disfigurement (Appendix, p. 10).
4. Temporary disability (Appendix, pp. 10-11).
5. Other permanent partial injuries (Appendix, pp. 11-12).

Possibly, accuracy requires one more classification, viz.: injury causing total permanent disability when combined with previous disability (Appendix, p. 14).

The Act contains no blanket provision, such as: "or any other injury which totally incapacitates the employee from working at an occupation which brings him an income, shall constitute total disability."<sup>2</sup>

<sup>1</sup>*New York Central R. Co. v. White*, 243 US 188, 202, 61 L.ed 667, 674.

<sup>2</sup>Minnesota statute, quoted in *Olson v. Griffin Wheel Co.*, 15 NW 2d 511, 156 ALR 1343.

The Act does provide: "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability." (Appendix, p. 11).

Beneficiaries of compensation because of an injury to an employee are classified:

- (a) Married employee with wife and one or more children (App. p. 6).
- (b) Father or mother of unmarried and childless employee (App. p. 7).
- (c) Father and mother of employee (App. p. 7).
- (d) Minor children of widowed or divorced employee (App. p. 7).
- (e) Unmarried employee without wife, children, father or mother (App. p. 7).

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**PETITIONER JENKINS, MARRIED WITH ONE CHILD UNDER 18 YEARS, AT TIME OF ACCIDENT ON SEPTEMBER 21, 1950, TOTAL AND PERMANENT DISABILITY COMPENSATION.**

Petitioner Jenkins at the time of his injury on September 21, 1950, was married and had one child (R. 36); hence, under subsection (a), supra (App. p. 6), he was entitled to be and was paid compensation of \$8,100.00 (R. 44); also temporary disability compensation of \$476.70 (R. 54); also, his medical, surgical, and hospital expenses of \$15,204.78 (R. 31 and R. 57), were paid by Respondents.



Respondents do not agree with the Appellate Court's theory (R. 95) that they were not entitled to deduct from or credit upon the \$8,100.00 total, permanent disability compensation the \$3,645 theretofore paid by them prior to July 25, 1951, as temporary disability compensation, but presumably, unless this Court dismisses this appeal for lack of jurisdiction, they must and will pay that \$3,645, should the Appellate Court's opinion not be reversed or modified, inasmuch as Respondents did not present that matter to this Court by writ of certiorari.

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**BASIC THEORY OF SCHEDULE-TYPE COMPENSATION  
IS BASED UPON LOSS OF EARNING CAPACITY.**

Schedule type compensation, such as the Act prescribes for total and permanent disability (Appendix, p. 6), and partial permanent disability (Appendix, pp. 7-10), and disfigurement (Appendix, p. 10), and other permanent partial injuries (Appendix, pp. 11-12), however, are not "to be interpreted as an erratic deviation from the underlying principle of compensation law—that *benefits relate to loss of earning capacity* and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proved one, based on the individual's actual wage-loss experience."<sup>3</sup> (Emphasis supplied.)

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<sup>3</sup>Larson's Workmen's Compensation, Vol. 2, 1952, §58.10, p. 42.



It is true that compensation for temporary disability is computed upon loss of daily average wages (Appendix, p. 10), and that compensation for total and permanent disability (Appendix, p. 6), partial permanent disability (Appendix, pp. 7-10), disfigurement (Appendix, p. 10), and other partial permanent disability (Appendix, pp. 11-12) is fixed in lump sums regardless of the amount of daily average wages, so long as it is some amount of wage, yet the compensation in each instance is awarded upon the principle that the employee by reason of the disability has suffered loss of earning capacity, or loss of wages, actual or presumed.

The United States Court of Appeals for the Ninth Circuit in this suit said: "Lump-sum payments for permanent total disability, on the other hand, are intended to represent capitalization of future earnings," (R. 97) and also said: "The basic principle of all workmen's compensation laws is that benefits relate to loss of earning capacity and not to physical injury" (R. 93). Thus, that Court also took the position that compensation under the Act is based upon loss of earning power, or loss of wages.

Petitioners, however, nonetheless distort (Petitioners' Br. p. 17), as they did in the Appellate Court, the Act's intention and meaning into basing compensation upon loss of earning capacity or loss of wages only in the case of temporary disability (Appendix, pp. 10-11), and upon physical injury and not upon loss of earning capacity or loss of wages in case of total and permanent disability (Appendix, p. 6), partial

permanent disability (Appendix pp. 7-10), disfigurements (Appendix, p. 10), and other partial permanent disability (Appendix, pp. 11-12).

The Act does not provide that the employer shall pay for all injuries that an employee may suffer, but only for those injuries that disable him in his earning capacity. No compensation is payable for an injury that does not actually or presumptively disable the employee from working.<sup>4</sup>

The Act<sup>5</sup> provides: "All compensation allowed hereunder for *temporary disability* shall be paid periodically and promptly in like manner as wages, . . ."; also,<sup>6</sup> "No compensation shall be paid hereunder for any injury *which does not incapacitate the employee from earning full wages* for a period of at least one day in addition to the date on which the injury occurred . . ." (Emphasis supplied.)

Compensation for total and permanent disability is based upon total permanent disability.<sup>7</sup>

Compensation for partial permanent disability is based upon partial permanent disability.<sup>8</sup>

Compensation for permanent partial injuries is based upon partial, permanent disability, and upon loss of earning capacity.<sup>9</sup>

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<sup>4</sup>Temporary disability, Appendix p. 10; Loss of Members as Permanent Disability, Appendix, p. 11.

<sup>5</sup>Sec. 43-3-3, ACLA 1949, Appendix, p. 16.

<sup>6</sup>Sec. 43-3-8, ACLA 1949, Appendix, p. 21.

<sup>7</sup>Appendix, p. 6.

<sup>8</sup>Appendix, p. 7.

<sup>9</sup>Appendix, pp. 11-12.

Nowhere does the Act prescribe that a "medical end result" must occur to terminate the period of disability.

Temporary disability terminates in two ways, either by return of earning capacity, or by resulting in permanent disability, either total or partial.

Disfigurement<sup>10</sup> is the only class of injury which the Act does not specifically base either upon disability or loss of earning capacity. It does provide that the disfigurement must be *serious*. (Emphasis supplied.) Even so, the disfigurement to be compensated should be so serious as to be presumptive that it will result in loss of earning capacity.

Professor Larson says: "*So deep-rooted, then, is the earning capacity principle in compensation law, that even under statutes defining disfigurement broadly*" (which the Act does not do) "*as any loss of or injury to a member not otherwise compensated for, the statute should not be read as extending to injuries which cannot be presumed to affect earning capacity at any time in the future.*"<sup>11</sup> (Emphasis supplied.) Also: "Although this kind of extension may be appealing because it lessens somewhat the harshness of the workmen's complete loss of remedy for industrial disfigurement, it cannot be accommodated to the underlying theory of compensation as described in the first chapter. *If compensation for disfigurement is confined to disfigurement which presumably interferes with obtaining and retaining employment, it of course*

<sup>10</sup>Appendix, p. 10.

<sup>11</sup>Larson's Workmen's Compensation, Vol. 2, §58.32, p. 51.

*fits within that theory*; but, when it goes beyond, it is time to inquire where the process is going to stop, once the accepted test of interference with earning capacity is abandoned.”<sup>12</sup> (Emphasis supplied.)

The whole concept of the Act is that all compensation, even for disfigurement is based upon loss of earning capacity, not upon injury.

The Appellate Court (R. 93) refuted Petitioners' contention that compensation was based on injury, not on loss of earning capacity.

The Appellate Court did not unqualifiedly hold “that if a man loses two limbs in an industrial accident, and thus becomes at once entitled to the maximum scheduled award for total and permanent disability, he is ‘conclusively presumed’ to have no remaining ability to work,” (Petitioners' Brief, p. 8), but restricted the presumption not only to the act itself but also to the particular accident, saying: “The individual receiving such an award may actually be able to continue some work, and hence he is, in fact, not totally and permanently disabled. But the fact that some ability to work remains is not to be taken into account in determining whether such an individual is entitled to the lump-sum award.” (R. 93-94), also: “The award for total permanent disability resulting from loss of members is thus intended as a maximum award for disability resulting from injuries received in an accident.” (R. 94.)

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<sup>12</sup>Larson's Workmen's Compensation, Vol. 2, §65.30, p. 139.

Admittedly Petitioner Jenkins' left foot, for which he now claims temporary disability, was injured in the same accident for which he was awarded and paid total permanent disability compensation (R. 39, 42, 48).

The text of Professor Larson's work<sup>13</sup> that Chief Judge Denman (R. 101) seemingly holds does not support the Appellate Court's (R. 93) holding that "in case of loss of certain members, total and permanent loss of earning power is conclusively presumed for the purpose of awarding compensation under the Act," is based upon specific provisions in the New York Act<sup>14</sup> which nowhere appear in the Alaska Act.

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**TERM "TOTAL TEMPORARY DISABILITY" NOT CONTAINED  
IN ACT IN EFFECT ON SEPTEMBER 21, 1950.**

The Act nowhere classifies "total temporary disability" as being entitled to compensation.<sup>15</sup> It is "temporary disability," regardless of degree, but which causes loss of capacity of earning full wages for a period of at least one day in addition to the day on which the injury occurs, that entitles the injured employee to compensation (§43-3-1, Appendix, p. 10; §43-3-8, Appendix, p. 21).

Not until the enactment of Chapter 60, SLA 1953, which became effective on June 24, 1953, whereas the Jenkins accident occurred on September 21, 1950, was

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<sup>13</sup>Larson's Workmen's Compensation Law, §58.10, p. 43, Vol. 2.

<sup>14</sup>New York W.C.L., § 15, subsection 4-a. Appendix C, p. 54.

<sup>15</sup>Petitioners' Br., p. 6.



the term "temporary total disability" inserted in the Act by the sentence: "Such compensation for temporary total disability shall not exceed the sum of \$75 per week and such period of temporary total disability shall not exceed 24 months from and after date of injury." §43-3-1(E).<sup>16</sup> Chapter 141, SLA 1955, effective June 26, 1955, amended that section by changing \$75 to \$100, as the maximum weekly compensation for temporary total disability

The Appellate Court and, of course, it was speaking of the Act as in effect at the time of the accident on September 21, 1950, said: "If an injury which causes 'temporary' disability thereafter develops or proves to be a 'total' disability, it is no longer a 'temporary' disability" (R. 95).

Plainly the Act would award compensation to Petitioner Jenkins should he sustain temporary disability from earning capacity had his left foot been injured in another or subsequent accident, but not in the same accident for which he was awarded and paid permanent total disability compensation. Here Petitioner Jenkins seeks to recover for temporary disability for an injury sustained in the same accident by which he sustained permanent total disability and for which he was awarded and paid total permanent disability compensation of \$8,100.00 (R. 40). Both the trial Court (R. 59) and the Appellate Court (R. 95) said he was not entitled to so recover and based it on that very ground.

<sup>16</sup>Appendix D, pp. 55-56.

<sup>17</sup>Appendix E, pp. 57-58.



**PETITIONER JENKINS SEEKS TO RECOVER TEMPORARY DISABILITY COMPENSATION FOR A PERIOD SUBSEQUENT TO HIS SUFFERING TOTAL, PERMANENT DISABILITY ON OCTOBER 28, 1950, FOR WHICH HE WAS AWARDED AND PAID TOTAL, PERMANENT DISABILITY COMPENSATION—AND BECAUSE OF AN INJURY SUSTAINED IN THE SAME ACCIDENT ON SEPTEMBER 21, 1950, FOR WHICH HE WAS AWARDED TOTAL, PERMANENT DISABILITY COMPENSATION.**

Petitioners seek to return to a status of "temporary disability," after adjudication as of October 28, 1950, of "total permanent disability" (R. 47) and after having been paid compensation therefor of \$8,100.00 plus temporary disability compensation of \$476.70 (R. 47, 51), and also in effect having been awarded by the Appellate Court (R. 95) temporary disability compensation of \$3,645.00, which has not been paid but which Respondents must pay should that Court's decision stand, inasmuch as Respondents have taken no appeal therefrom, or temporary disability compensation of \$4,121.70 for temporary disability prior and up to the date of his total permanent disability and \$8,100.00 for total permanent disability compensation, making total compensation of \$12,221.70 plus more than \$15,000.00 for medical, surgical and hospital expense compensation (R. 57), actually \$15,204.78 (R. 31).

Petitioners' thesis is that Petitioner Jenkins should be paid, notwithstanding his adjudication as of October 28, 1950 (R. 46-47) of total and permanent disability, for which he has been paid, temporary disability compensation commencing with October 29, 1950 (R. 52), and thenceforth as long as such temporary disability might continue, even throughout his

life; in fact, his application for adjustment of claim (R. 49) states "until there is an end of disability," although now he minimizes that claim by stating he returned to work for Chugach Electric Association in January, 1955 (Petitioners' Brief, page 21).

As heretofore stated, should Petitioner Jenkins be accidentally so injured as to suffer disability of earning capacity in this subsequent work that he has undertaken for Respondent Chugach Electric Association he would be entitled to compensation therefor because it would occur in a different accident than the accident of September 21, 1950, for which he was awarded and paid total permanent disability compensation of \$8,100.00, plus temporary disability already paid or possibly payable of \$4,121.70 (R. 47, 51, 95).

Respondents challenge the correctness of what Petitioners call the "harsh result" (Petitioners' Br. 24) of the Appellate Court's interpretation (R. 93-95) of the Act. As hereinbefore pointed out, that Court said that ability might still continue to do some work, and restricted its interpretation to disability arising out of one particular accident (R. 93); here, the accident of September 21, 1950.

Respondents concede the general rule that workmen's compensation laws are to be liberally construed, but submit

"There are, however reasonable limitations upon the rule of liberal construction. It may not be extended so far as to evade the plain intent or to deny the clear mandate of the statute, nor should the operation of the law be stretched by any extravagant principle of inclusion. The

courts have no power to extend its provisions to cases not fairly within its scope or to deny its application to those that are, and may not attempt by construction of the statute to develop a more comprehensive or more logical system of compensation than that which was in fact enacted. The humane spirit of the statute does not warrant its extension beyond its legitimate scope."

58 *Am. Jur.*, §27, pp. 595, 596, 597.

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**APPELLATE COURT'S MAJORITY DECISION IS  
NEITHER HARSH NOR UNSOUND.**

The Appellate Court's majority decision (R. 85-97) is neither harsh nor unsound. It is based upon the plain meaning of the Act, except as to the questions of jurisdiction and of the \$3645 deduction.

Respondents do not agree with the Appellate Court's theory (R. 95) that they were not entitled to deduct from or credit upon the \$8100 total permanent disability compensation the \$3645 theretofore paid by them prior to July 25, 1951, as temporary disability compensation, but presumably, unless this Court dismisses this appeal for lack of jurisdiction they must and will pay that \$3645, should the Appellate Court's opinion not be reversed or modified, inasmuch as Respondents did not present that matter to this Court by writ of certiorari.

Certainty is of the essence of workmen's compensation acts: certainty that the employee will be compensated for his loss of earning capacity and of the amount he will receive, and certainty of the employer as to the amount he must pay.

Maximums are necessary to accomplish that certainty for both employee and employer; otherwise, two employees working for the same wages in the same kind of work for the same employer sustaining the same kind of injury might receive different amounts of compensation; otherwise, the employer might be compelled to pay one of those employees a very small amount of compensation and to pay the other as huge a sum as might have been adjudged against him in a tort action, whose risk of unfair damages either for or against an employee or for or against an employer is fundamentally different from the concept of workmen's compensation.

*Larson's Workmen's Compensation Law*, Vol. 1, (1952), page 4, §2.

Respondents submit that the plain purpose of the Alaska Act is to fix maximum compensations for loss of earning capacity.

Hypothetical situations posed by Chief Judge Denman (R. 99) and by Petitioners (Brief, p. 23) are ineffectual as against the terms of the Act itself, which of necessity to gain certainty of compensation disregard many distinctions, which might be of persuasive weight in a tort action.

Section 43-3-1, subparagraphs 1 through 7, fixes maximum death benefits (Appendix, pp. 3-5). The poor widow receives the same as the rich widow, \$4,500.00. A widow with 5 minor children receives the same as a widow with 10 minor children, \$9,000.00.

An employee suffering permanent total disability who has 5 children receives the same amount as one

who has 2 children. A widower suffering permanent total disability receives the same compensation whether he has 4 children or 10 children.

In each instance the maximum is \$9,000.00. Jenkins was paid \$8,100.00, the maximum permanent total disability compensation because at the time of his injury he had a wife and one minor child.

Maximums are fixed for partial permanent disability.

A temporarily disabled employee regardless of whether single, married, having children or being childless, having parents or being an orphan receives the maximum sum of 65% of his daily average wages.

An employee suffering a permanent partial injury may be entitled to a maximum of \$7,200.00, but no more, regardless of whether single, married, having children, or being childless, having parents or being an orphan.

On September 21, 1950, had Petitioner Jenkins been killed by a third party's negligence outside his employment, his personal representative, despite the vicissitudes of a tort action, could have recovered not more than \$15,000 damages<sup>18</sup> regardless of whether the decedent was intelligent or stupid, cultured or illiterate, rich or poor, of high or low earning capacity, single, divorced, married, with or without children, father or mother.

Posed situations, no matter how exaggerated, could not have got more. Petitioner Jenkins' workmen's

<sup>18</sup>Ch. 89, SLA 1949, Appendix F, p. 59.



compensation is likewise subject to the provisions of the Act, not to posed exaggerated situations, not similar to the facts at bar.

**LACK OF JURISDICTION TO MODIFY OR ALTER THE ALASKA INDUSTRIAL BOARD'S DECISION AND AWARD OF FEBRUARY 6, 1953 (R. 46).**

Under the well settled rule,

“that where the lower Court has acquired no jurisdiction of the subject matter of an action, an appeal cannot confer any jurisdiction on the appellate court, notwithstanding the trial therein is de novo and the court would have original jurisdiction of the matter in controversy.”

*Appeal and Error*, 2 Am. Jur. §11, p. 851,

which rule Corpus Juris Secundum states:

“An appeal from the decision of an inferior court which has no jurisdiction generally confers no jurisdiction on the Appellate Court,”

*Appeal and Error*, 4 CJS §41, p. 158,

neither this Honorable Court, the Appellate Court, nor the trial Court, the latter not doing so but to the contrary affirming (R. 56) the decision and award of the Alaska Industrial Board of February 6, 1953 (R. 46), has jurisdiction to modify or alter that decision and award of that Board.

This Court, on an appeal from the Circuit Court of the United States for the Southern District of New York, although a stipulation had been entered into that the decree should follow that of another case, which was affirmed, said:



“But it is now assigned for error that, as defendant and complainants below were citizens of the same State, and the bill did not allege that the trade-mark in controversy was ‘used on goods intended to be transported to a foreign country,’ Act of March 3, 1881, c. 138, §11, 21 Stat. 502, the Circuit Court had no jurisdiction, and the decree must be reversed for that reason. The objection is well taken, and the decree is accordingly reversed.”

*Ryder v. Holt*, 128 US 525, 32 L.ed. 529.

Also see:

*U. S. v. Alamogordo Lumber Co.*, 202 F. 700 (CCA-8);

*Hare v. Birkenfield*, 181 F. 825 (CCA 9);

*U. S. v. Dickerson*, 101 F. Supp. 262.

This lack of jurisdiction was raised by Respondents' Motion and Answer before that Board (R. 50) and before it rendered its decision of January 8, 1954 (R. 52).

Respondents also raised it by their Amended Complaint and Appeal in the District Court (R. 28, 32-35).

The trial Court at least inferentially so held in its Opinion of July 27, 1954 (R. 56-60).

This lack of jurisdiction of the Alaska Industrial Board was before the Appellate Court (R. 28, 46, 50, 56-60). Majority Opinion (R. 85, 88-91).

No gainsaying that the Alaska Industrial Board is not a forum of any higher rank than an inferior court or a county board or other similar tribunal.

Respondents' contention that the Alaska Industrial Board had no jurisdiction to render its decision (R. 52) of January 8, 1954, is based upon three sections of the Act, viz.: "Modification of Compensation; continuing jurisdiction; Effect of review upon moneys already paid; Limitation of time," Section 43-3-4 (Appendix, p. 10); "Award to be final and conclusive; Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on dock: Early determination: Increase in award," Sec. 43-3-22 (Appendix, p. 37); and "Claims barred if not filed within two years," Sec. 43-3-29 (Appendix, p. 44).

**SECTION 43-3-4, ACLA 1949 DID NOT AUTHORIZE THE HEARING ON DECEMBER 28, 1953, OR THE BOARD'S DECISION AND AWARD OF JANUARY 8, 1954.**

Sec. 43-3-4, ACLA 1949, provides:

"Provided, however, no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three years after the injury."

The District Court in *Suryan v. AIB*, 12 Alaska 571, 573, ..... F. Supp. ...., said that the Board's continuing jurisdiction for three years to review its decisions and awards is limited solely to the adjustment of the rate of compensation where there is a change in the physical condition of claimant.

The last quotation from §43-3-4 is the last clause in that section and controls all of the preceding language of that section.

That section further conditions the Board's continuing jurisdiction to a higher rate of compensation, by the prior clause therein, namely:

"And it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, *after first deducting the amount* that has already been paid him or her." (Emphasis supplied.)

Moreover, Petitioner Jenkins' application of November 21, 1953 (R. 48-49), which is more than three years after September 21, 1950, the date of the accident, is specifically based upon the accident of September 21, 1950, by the language: "Injured, left work on 9/21/50, and disability continued to present time," after previously stating therein that he was injured on September 21, 1950, and specifying among his injuries: "badly burned left foot. Four toes on left foot amputated."

Respondents submit that the three years' continuing jurisdiction commences on the date of the injury, and its exercise is limited (a) to the development within three years after the date of injury of the disability for which the increased rate of compensation may be allowed and (b) to the injured employee presenting to the Board his claim therefor within that same three years.

Factually, although Petitioners undoubtedly do not so intend, Petitioner Jenkins seeks a lower rate of compensation, i.e.: temporary disability compensation,

notwithstanding Sec. 43-3-4, *supra*, covers situations only where, by reason of a disability developing after an award is made, an injured employee becomes entitled to a higher rate of compensation than allowed him by that award. It is inconceivable that Jenkins would agree to, or would refund the \$8,100.00 maximum total permanent disability compensation paid him should Appellees be required to pay to Jenkins total temporary disability compensation in accordance with the Board's decision and award of January 8, 1954 (R. 52).

It is beyond even liberality of logic to be able to deduct a higher sum or amount from a lower sum or amount. Mathematics cannot subtract 12 from 6 and leave a remainder.

But, as seen, Sec. 43-3-4, *supra*, requires not only entitlement to a higher rate of compensation but also deduction, prior to receiving such higher rate, of the amount that has already been paid.

The trial Court so construed the statute (R. 58-59), and held that the Board may not, after making a finding of permanent total disability, "make a finding of the existence of a lesser degree of disability and allow compensation therefor, because obviously such lesser degree is included in the greater."

That principle has been recognized by the United States Court of Appeals in two previous Alaska Workmen's Compensation cases.<sup>19</sup>

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<sup>19</sup>*Fern G. M. Co. v. Murphy*, 7 F.2d 613, 5 Alaska Federal Reports 275, 277;

*Ketchikan L & S Co. v. Walker*, 15 F.2d 722, 5 Alaska Federal Reports 321, 325.

**THE ALASKA INDUSTRIAL BOARD HAD NO JURISDICTION TO MAKE ITS DECISION OF JANUARY 8, 1954 (R. 52), BECAUSE PETITIONER JENKINS TOOK NO APPEAL FROM THE BOARD'S DECISION AND AWARD OF FEBRUARY 6, 1953 (R. 46-47).**

Petitioner Jenkins took no appeal within 30 days after February 6, 1953, as required by Sec. 43-3-22, ACLA 1949, or at all.

“... An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within 30 days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred.”

Sec. 43-3-22, ACLA 1949.

Respondents submit that “No compensation for total temporary disability is thereafter payable” constitutes a finding by the Board and is conclusive and binding upon the Board and the Courts; but, if it constitutes a conclusion or a decree of law, it became final 30 days after February 6, 1953, no appeal from it having been taken to the District Court.

Nonetheless, the Board more than eleven months later on January 8, 1954 (R. 52), modified and reversed its decision and award of February 6, 1953, when it said: “The Full Board finds a condition of temporary total disability existed on October 29, 1950” (R. 52), which is diametrically opposed to its



previous decision of February 6, 1953, that "No compensation for total temporary disability is payable after" October 28, 1950 (R. 47).

The statute nowhere authorizes or empowers the Board to so modify and reverse its own previous decision and award.

Such procedure would lead to litigation never ending, or as said by the late Alaska District Judge Folta in referring to Sec. 43-3-4, ACLA 1949, viz.:

"In the face of this provision, it would seem that the case falls within the rule that the express mention of one thing is the implied exclusion of another. But perhaps there is a more cogent reason for holding that the power does not exist by implication. There must be an end to litigation."

*Suryan v. AIB*, 12 Alaska-Reports 571, 573.

Moreover, "The right of appeal from proceedings involving an award of workmen's compensation is statutory and is governed by the particular provisions of the act involved."

*Workmen's Compensation*, 58 Am. Jur. 899, Par. 534, id. 901, Par. 526;

*Nash v. Douglas Aircraft Co.*, 214 F.2d 919 (Okla.)

The 30-day limitation to appeal in Sec. 43-3-22, ACLA 1949, is useless legislation if, without Petitioner Jenkins having taken an appeal from the decision and award of February 6, 1953 (R. 46-47), the Board can reopen the case on January 8, 1954 (R. 52), and reverse its previous decision and award.



The Full Board made the decision and award of February 6, 1953 (R. 46-47), specifically finding that Jenkins "suffered temporary total disability during the period September 21, 1950, to October 28, 1950," and "On approximately October 28, 1950, . . . suffered a total permanent disability," and "His condition having been rated as a total permanent disability on that date, no compensation for total temporary disability is thereafter payable."

The quoted findings of the Board in its decision and award of February 6, 1953 (R. 46-47), necessarily preclude the finding in its decision and award of January 8, 1954 (R: 52), that "a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached."

The later finding is not authorized by any law, and if such a practice were allowed there would be no end to any compensation litigation, and in the remote future Jenkins could contend that the Board had authority to make other findings different from those in its decision and award not only of February 6, 1953, but of January 8, 1954.

**THE ALASKA INDUSTRIAL BOARD HAD NO JURISDICTION TO MAKE ITS DECISION OF JANUARY 8, 1954 (R. 52) BECAUSE PETITIONER JENKINS FILED NO CLAIM FOR TEMPORARY DISABILITY COMPENSATION FROM AND AFTER OCTOBER 29, 1950, WITHIN TWO YEARS AFTER HIS INJURY ON SEPTEMBER 21, 1950 (R. 3, 39).**

Petitioner Jenkins' Application of November 21, 1953, was filed with the Board on or about November 23, 1953 (R. 48-49). Jenkins' letter of May 14, 1953 (R. 21-22), to Board Chairman Benson was presumably filed about May 14, 1953. Jenkins' affidavit of December 16, 1953 (R. 24-26), was presumably filed with the Board about December 17, 1953.

Assuming without conceding that any one or more of them constituted a claim, none of them was filed with the Board within two years of Jenkins' injury on September 21, 1950, as required by Sec. 43-3-29, ACLA 1949, which statute is one of limitation.

Section 43-3-29 reads:

"Claims; Limitation. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity."

Section 43-3-29, supra, is an absolute bar to the right to compensation, not a limitation upon the remedy.

The language of this section is substantially identical with the language of Section 2189, CLA 1933, under the former act, reading:

"Any and all claims for compensation hereunder shall be barred unless an action for the recovery of the same shall be commenced within two years after the cause of action accrued, or, in the event of mental incapacity, within two years after the removal of the mental incapacity."

In construing that act, the United States Court of Appeals for the Ninth Circuit said:

"It is contended by appellant that appellee's conduct 'amounted to fraud and resulted in the tolling of the statute of limitations,'

This contention must be rejected. Section 29 (Section 2189, *supra*) is more than a statute of limitations. The limitation prescribed goes not merely to the remedy, but to the right of action created by the act. This right of action is wholly statutory and must be accepted with all the conditions and limitations which the act imposes. The requirement that the action be commenced within two years is a limitation upon the right, not a mere limitation upon the remedy. This requirement is absolute and unconditional. If the action is not commenced within two years, there is no right of action and pleas of ignorance, concealment, misrepresentations, and fraud are of no avail."

*Hilty v. Fairbanks Exploration Co.*, 82 F.2d 77, 5 Alaska Federal Reports 818, 821-822.

In that decision this Court approvingly cited its former decision in *Rogulj v. Alaska Gastineau Mining Co.*, 228 F. 549, 5 Alaska Federal Reports 142, 145.

Clearly under those decisions Jenkins failed to sustain the burden of proof not only of filing his claim within two years of his injury on September 21, 1950, but also of giving notice within two years of their now alleged occurrence to Chugach of his injuries for which he now seeks temporary disability compensation commencing October 29, 1950.

Also see:

*Ewing v. Risher*, 176 F.2d 641, 644 (CCA 10);  
*Nash v. Douglas Aircraft Co.*, 214 P.2d 919  
 (Okla.).

Petitioner Jenkins after having been awarded the maximum total permanent disability compensation of \$8100.00 as well as temporary disability compensation of \$476.70 up to the date of his injury becoming on October 28, 1950, a total permanent disability, as found by the Board in its decision and award of February 6, 1953 (R. 46-47), now seemingly contends that under the particular subparagraph of Sec. 43-3-1 entitled "Temporary Disability" (Appendix, p. 10), he is entitled to temporary disability compensation commencing October 29, 1950, and thenceforward into the indefinite future. He ignores entirely the fact that this particular statutory provision does not apply to injuries causing temporary disability; it specifically restricts the injuries to "relating to cases other than temporary disability."

While the Act is to be construed liberally, liberality does not mean that the Act is to be construed harshly against the Respondents in disregard of its purpose to make certain to Jenkins that he will be equitably compensated for his loss of earning capacity and to make certain to Chugach that it will not be mulcted in huge damages as at common law. Under Petitioners' theory the whole value of the Act would be destroyed, viz.: certainty of compensation both to employer and employee; despite the Board's decision and award of February 6, 1953 (R. 46-47), that Jenkins suffered total permanent disability on October 28, 1950.

There is no statutory authority, either express or implied, in Sections 43-3-1. through 41, supra, that sustains the Board's decision and award of January 8, 1954 (R. 52), and its finding of "a condition of temporary total disability existed on October 29, 1950, and continues to this date, no end medical result having been reached" cannot be construed in any manner other than as setting aside and a modification of its decision and award of February 6, 1953 (R. 46-47), wherein it found that on October 28, 1950, Jenkins suffered a total permanent disability and that no temporary disability compensation was payable to him after that date.

There is no statutory authority authorizing the filing or presenting of Jenkins' Application of November 21, 1953 (R. 48-49), or its consideration by the Board, and it should have been stricken in accord-



ance with Respondents' Motion and Answer of December 9, 1953 (R. 50-51), before the Board.

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**THE ALASKA INDUSTRIAL BOARD HAD NO CONTINUING JURISDICTION ON JANUARY 8, 1954, TO AWARD TEMPORARY DISABILITY COMPENSATION FOR A PERIOD AFTER PETITIONER JENKINS HAD SUFFERED TOTAL PERMANENT DISABILITY.**

Nor does Section 43-3-4 (Appendix, p. 18) confer such jurisdiction upon the Board because the last clause therein, reading: "provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury," controls the entire section including the Board's continuing jurisdiction, at any time and upon its own motion, to review any agreement, award, decision or order.

As stated no such claim was presented within three years of the accident from which the injury occurred on September 21, 1950 (R. 3, 39).

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### **CONCLUSION.**

**WHEREFORE,** Respondents submit:

1. This Honorable Court has no jurisdiction because the Alaska Industrial Board was without jurisdiction to make and enter its decision of January 8, 1954 (R. 52), and, being an inferior court, tribunal or board without jurisdiction, no Court can take jurisdiction thereof.



2. Should this Honorable Court hold that it has jurisdiction, then the majority opinion of the United States Court of Appeals for the Ninth Circuit (R. 85-97) should be affirmed.

Dated, Juneau, Alaska,  
December 11, 1957.

RALPH E. ROBERTSON,  
*Counsel for Respondents.*  
FREDERICK O. EASTAUGH,  
*Counsel for Respondents.*

(Appendices A, B, C, D, E and F Follow.)

**NOTE .**

Appendices A and B, pages 1 through 53, are  
Appendices A and B, pages 1 through 53, of  
Appellees' Brief in CA 9, No. 14,616.

## Appendix A

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Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

“AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death; defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937.”

as amended by Chapter 45, SLA 1947, entitled

“AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.”

now compiled as Sections 43-3-1 to 43-3-39, ACLA 1949.

**§43-3-1. Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability.** Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury, such beneficiaries shall be entitled,

and for which such employer shall be legally liable, shall be as follows:

(1) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars (\$4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars (\$900) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars (\$9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars (\$900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars (\$9,000.00) and the payments to which the widow and children may be entitled shall be first paid out of said sum of Nine Thousand Dollars (\$9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-Five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars (\$4,500.00) and the further sum of Nine Hundred Dollars (\$900.00) for each orphan child



under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars (\$9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars (\$4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT, NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.



(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND.) In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars (\$195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars (\$1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars (\$6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars (\$6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars (\$6,000.00), with an additional sum of Nine Hundred Dollars (\$900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars (\$9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars (\$6,000.00).

#### (PARTIAL PERMANENT DISABILITY.)

Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1(a) In case the employee was at the time of the injury unmarried, \$720.00.

1(b) In case the employee was married but had no children, \$900.00.

1(c) In case the employee was either married or a widower, but had one or more children, \$1,080.00.

For the loss of an Index Finger:

2(a) In case the employee was at the time of the injury unmarried, \$450.00.

2(b) In case the employee was married but had no children, \$585.00.

2(c) In case the employee was either married or a widower, but had one or more children, \$720.00.

For the loss of any other finger than the Index Finger and Thumb, \$270.00.

For the loss of a Great Toe, \$450.00.

For the loss of any other Toe other than the Great Toe, \$180.00.

For the loss of a Hand:

3(a) In case the employee was at the time of the injury unmarried, \$2,160.00.

3(b) In case the employee was married but had no children, \$2,880.00.

3(c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Arm:

4(a) In case the employee was at the time of the injury unmarried, \$2,700.00.

4(b) In case the employee was married but had no children, \$3,600.00.

4(c) In case the employee was either married, or a widower and had one child, \$3,600.00 and \$450.00 additional for each such additional child, the total amount not to exceed, however, \$4,500.00.

For the loss of a Foot:

5(a) In case the employee was at the time of the injury unmarried, \$2,160.00.

5(b) In case the employee was married but had no children, \$2,700.00.

5(c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, but not to exceed the total sum of \$3,600.00.

For the loss of a Leg:

6(a) In case the employee was at the time of the injury unmarried, \$2,700.00.

6(b) In case the employee was married but had no children, \$3,600.00.

6(c) In case the employee was either married, or a widower and had but one child, \$3,600.00 with \$450.00 for each such additional child, not to exceed the total sum of \$4,500.00.

For the loss of an Eye:

7(a) In case the employee was at the time of the injury unmarried, \$2,160.00.

7(b) In case the employee was married but had no children, \$2,880.00.

7(c) In case the employee was either married, or a widower and had one child, \$2,880.00 plus \$360.00 for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Ear: \$360.00.

For the loss of hearing in one Ear: \$720.00.

For the loss of the Nose: \$720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of (Two Thousand Dollars (\$2,000.00)).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or



establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstances in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a



result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars (\$7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars (\$7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars (\$1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars (\$5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00)

that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensation pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial disability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraphs (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury fund hereinbefore created and provided.

**§ 43-3-2. Treatment and care of injured employees: Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician.** The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by

the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

**§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty.**

All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which



the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid bi-weekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

**§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time.** If an injured employee (is) entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed



to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

**§ 43-3-5. Lien to secure compensation: Extent: Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment.** Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien

shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating in substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

**§ 43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved.** At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

**§ 43-3-7. Injuries not covered.** No compensation shall be allowed or paid for the injury or death of

an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

**§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report.** No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his employer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

**§ 43-3-9. Presumption of employment: "Independent contractors" defined.** Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

**§ 43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred.** The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

**§ 43-3-11. Step-parents, adopted children, and step-children: How regarded.** Step-parents shall be



regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

**§ 43-3-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.**

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall



be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To..... (giving the name of the beneficiary).

This is to advise you that.....  
 (giving the name of the deceased person) became deceased on the ..... day of .....  
 as a result of an injury received while in the employ of ..... You will take notice that

all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employer within one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided; may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFICIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with

some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

**§ 43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service.**

In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or

shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

**§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses.** The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer

or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

**§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties.** If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be



paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred; unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

**§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies.** If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not

held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

**§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs.** Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

**§ 43-3-18. Insurance or proof of financial ability: Deposit of security.** Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

**§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply.** Every employer under this Act, except those exempted therefrom by Section 1 (§ 43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act: provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

**§ 43-3-20. Self-insurance certificates: Revocation:**

**New certificate.** Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hearing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

**§ 43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.**

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance

company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire compensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation

charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said employees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of



the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer

covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.) That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have re-submitted its policy form and received the approval thereof by the Insurance Commissioner.

**§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket:**

**Early determination: Increase in award.** An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein) shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and be returned in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such

substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

**§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician.** The fees of attorneys and physicians, and the charges of nurses and hospitals, for services under this Act shall be subject to the approval of the Industrial Board. "When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award." The Industrial Board may withhold the approval of the fees of the attending physician in any

case until he shall file a report with the Industrial Board on the form prescribed by such Board.

**§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment.** Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

**§ 43-3-25. Jurisdiction of courts.** No court of this Territory except the United States District Court on review, or the United States Circuit Court of Appeals

on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

**§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Issuance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.**

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.



(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.)

Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

**§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin.** The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this Act, or any action to recover damages against any employer who is subject to the compensation provisions of this Act. If any employee refuses to submit himself or herself to any such examination or examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

**§ 43-3-28. Waiver or exemption from statute forbidden.** No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

**§ 43-3-29. Claims barred if not filed within two years.** Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

**§43-3-30. Liability of third persons. Proceedings by employer: Subrogation to employee.** Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

**§ 43-3-31. Report of termination of compensation.** Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

**§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions.** If such employer

fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a coemployee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of

proof shall rest upon the employer to rebut the presumption of negligence.

**§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice.** Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employment according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the following form, and the signature shall be witnessed by two witnesses:

### EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is.....in accordance with the terms, conditions and provisions to pay compensation to employees of the



undersigned for injuries received as provided in the Act of the Territory of Alaska, known as the "Workmen's Compensation Act of the Territory of Alaska."

(Signed).....

Witnesses:

.....

.....

**§ 43-3-34. Article to be part of every contract of hire: Construction.** This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

**§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance.** All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensation in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out

of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

**§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers.** A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

**§ 43-3-37. Assignment of Claim: Waiver of exemption.** No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

**§ 43-3-38. Definition of terms.** Wherever the term "employer" is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock,

company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the terms "employee" is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term "employer" shall include the insurer so far as applicable.

The term "beneficiary" as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, wherever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, "child" or "children" shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

"Widower" shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

"Married" shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term "injury" or "personal injury" means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the

general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee's wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

**§ 43-3-39. Title of Act.** This Act shall be cited as "The Workmen's Compensation Act of Alaska."

**§ 43-3-40. Separability of provisions.** If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

**§ 43-3-41. Laws Repealed.** This Act shall supersede and repeal all other laws of the Territory relating to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,<sup>a</sup> as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are specifically repealed.

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<sup>a</sup>Formerly Chapter 25, Session Laws of Alaska 1929.

## Appendix B

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**§ 43-3-5. Lien to Secure Compensation: Extent: Priority and rank: Notice of Lien: Filing and Contents: Enforcement: Attachment.** Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The

lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or someone on his or her behalf, and stating in substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

Ch. 104, SLA 1949.



**Appendix C**

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**(NEW YORK) WORKMEN'S COMPENSATION LAW.**

**4-a. PROTRACTED TEMPORARY TOTAL DISABILITY IN CONNECTION WITH PERMANENT PARTIAL DISABILITY.**—In case of temporary total disability and permanent partial disability both resulting from the same injury, if the temporary disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision three of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks, toe other than great toe, eight weeks.

In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision three. (Subd. 4-a inserted by L. 1924, ch. 500).

## Appendix D

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CHAPTER 60, SLA 1953 (SUBSECTION 43-3-1 E, ACLA 1949).

**E. TEMPORARY DISABILITY.** For all injuries causing temporary disability, the employer shall pay the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. Such compensation for temporary total disability shall not exceed the sum of Seventy-Five Dollars (\$75.00) per week and such period of temporary total disability shall not exceed twenty-four months from and after date of injury. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have

a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

## Appendix E

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CHAPTER 141, SLA 1955 (SUBSECTION 43-3-1 E, ACLA 1949).

**E. TEMPORARY DISABILITY.** For all injuries causing temporary disability, the employer shall pay the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. Such compensation for temporary total disability shall not exceed the sum of \$100 per week and such period of temporary total disability shall not exceed twenty-four months from and after date of injury. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a

due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

**Appendix F****CHAPTER 89, SLA 1949.**

Section 1. Sec. 61-7-3 ACLA 1949 is hereby amended to read as follows:

**Sec. 61-7-3: ACTION FOR WRONGFUL DEATH: DISPOSITION OF AMOUNT RECOVERED.** When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifteen thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife, or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper.